Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 338.

THE WICHITA AND AFFILIATED BANDS OF INDIANS,

APPELLANTS,

v.

THE CHOCTAW NATION AND THE CHICKASAW NATION, AND THE UNITED STATES.

Appeal from Court of Claims.

BRIEF FOR CHOCTAWS AND CHICKASAWS.

Before attempting to establish the title of the Choctaws and Chickasaws, and to controvert the positions of the appellants' counsel, I beg leave to refer to the opinion delivered by the dissenting judge in the court of claims. The following is the first clause of the third article of the treaty concluded between the United States and the Choctaw and Chickasaw nations, on the twenty-eighth of April, 1866:

The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the ninety-eighth degree west longitude, known as the leased district, PROVIDED, &c.

The dissenting judge concludes that the word "cede" necessarily imports an absolute conveyance, and that, in this clause, an absolute cession is expressed in words so "free from doubt and ambiguity" as to leave no room for construction or interpretation; and therefore no evidence *aliunde* is admissible to show the intention of the parties to have been that the cession should be a cession in trust. His conclusion is stated in the following clauses of the dissenting opinion, Rec. p. 89:

In case of doubt, it is permissible for the court to consider the history of the times, but that is not this case. It is not a question of construction, for, as before said, the language of the cession is free from doubt and ambiguity, and, therefore, needs no interpretation. * * Tested by the rules of law, applicable to the case, the claimants have no "right, title and interest" in and to the lands in controversy, for the reason that, by the treaty of 1866, they made, in language importing but one meaning, an absolute cession thereof to the government; and their rights being fixed by that law, equity will not intervene to relieve them from the consequences of their own act.

It may be assumed for the purposes of the argument, that this clause, standing alone, expresses a *presumptively* absolute cession and that the burden is on the appellees to show that it was a cession in trust. But it is clear, I think, upon principle and authority, that proof *aliunde* is admissible to show that the cession was intended, by the parties to the treaty, as a conveyance in trust. I also think that other provisions of the treaty are inconsistent with the position that an absolute cession was intended by the parties.

In different treaties the meaning and effect of the words, "cede" and "cession," are very different. The same words, in slightly modified forms, are common to several European languages. In some treaties the cessions are transfers of dominion over the ceded territory, but not of

property therein. Others are transfers of dominion over, and of property in, the territory. Some are cessions, by way of mortgage, to secure the discharge of obligations; others are cessions in trust. Some are cessions in perpetuity; others for limited periods. When the word, "cede," or "cession," occurs in a treaty, unless there are other words therein, to show to which of these classes the cession belongs, it becomes competent and necessary to resort to evidence *aliunde*, for the purpose of determining the character of the cession. This is the doctrine of the accepted authorities on international law, and of the American and English courts.

We shall see, at once, the necessity of a recurrence to evidence *aliunde*, to ascertain the significance and effect of the word, "cede," if we attempt to ascertain, from the face of this ceding clause, some of the characteristics of the cession. Is it merely a cession of dominion over the land? Or, is it a cession both of dominion over and of property in the land? This clause furnishes no answer to these questions. For an answer we must go outside the clause. We must ascertain whether this land was the public property of the Chickasaw nation, or the individual property of the citizens of that nation. In the Choctaw treaty of October 18, 1820, the United States "do hereby cede to said nation a tract of country," &c. Was this a cession of dominion over the ceded land? If it was a cession of dominion, was the dominion so ceded paramount? Or, was it subordinate, the paramount dominion being retained by the United States? Was it a cession of property in the ceded tract? The word, "cede," in the treaty will not answer either one of these questions. How much real and personal property was ceded, with the dominion of Porto Rico, in the recent Spanish treaty? The word "cede" will not answer that question. It will be

necessary to ascertain *aliunde* how much of the land and other property was owned by Spain. Does the word "cede," in the treaty of 1866, import an absolute cession, or a cession in trust, or a mortgage? The clause gives no answer to this question; for the word "cede" may import either of these cessions. If the presumption is in favor of the absolute cession, it is not a conclusive presumption.

The question, here, is not whether the language of a written agreement can be changed by parol evidence, nor is it the single question whether a deed, absolute on its face, can be shown, by evidence *aliunde*, to be a deed in trust. The questions, so far as the point now under consideration is concerned, are (1) whether the first clause of the treaty imports conclusively or only presumptively an absolute cession; (2) whether other provisions of the treaty make the cession a cession in trust; and (3) whether, if there is nothing in other parts of the treaty, to qualify this ceding clause, proof is admissible to show that it was intended as a cession in trust.

The question whether a deed, absolute upon its face, can be shown, by evidence *aliunde*, to be a deed in trust, even though the trust may have been created by parol, is settled in the affirmative, in those jurisdictions in which the creation of trusts by parol is not interdicted by statute. Babcock *v.* Wyman, 19 How. 289; Russell *v.* Southard, 12 How. 154; Conway *v.* Alexander, 7 Cranch, 238; Morris *v.* Nixon, 1 How. 126; Osterman *v.* Baldwin, 6 Wall. 116; Morris *v.* Nixon, 17 Pet. 109; Flagg *v.* Walker, 113 U. S. 659; Foy *v.* Foy, 2 Hayw. 141; Jackson *v.* Moore, 6 Cow. 220; Walton *v.* Conley's admr., 14 Wend. 63; Van Buren *v.* Olmstead, 5 Paige, 9; Jenkins *v.* Eldridge, 3 Story, 293; Stafford *v.* Wheeler, 93 Pa. St. 462; McLaurin *v.* Partlow, 53 Ill.

340; Beadle *v.* Beadle, 2 McCrary, 586; Edrington *v.* Harper, 3 J. J. Marshall, 355; Pierson *v.* Pierson, 5 Dec. Ch. 11; Norman *v.* Burnett, 25 Miss. 183; Smith *v.* Eckford, 18 S. W. 210; Cordova *v.* Lee, 14 S. W. 208; Barrill *v.* Hanrick, 42 Ala. 60; Greenl. Ev. 266; Podmore *v.* Gunning, 7 Simons, 644; Lloyd *v.* Spillote, 2 Atk. 150; Ross *v.* Newall, 1 Wash. Rep. 14; Walkins *v.* Stockett, 2 Harr. and Johns. 435; Strong *v.* Stewart, 4 Johns. Chy. 167; English *v.* Lane, 1 Porter, Ala. 318; Hayworth *v.* Worthington, 5 Black, 361; King *v.* Newman, 2 Munf. 40; Dunham *v.* Dey, 15 John. 555; Overton *v.* Bigelow, 3 Yerg. 513.

In Babcock *v.* Wyman, 19 How. 289, the deed in question was absolute, on its face. The court said:

Three points may be considered as embracing the merits of this case: 1. Was the deed, executed by Nehemiah Wyman to Babcock, for the eleven and one-half acres of ground, given in trust? 2. Can this trust be established, by parol evidence? 3. Does the statute of limitation, or lapse of time, affect the claimant's rights?

The court decided, on the evidence, that the deed was given in trust, and held that the trust could be established by parol proof. And the court cited, in support of this ruling, a multitude of authorities.

In Mead *v.* Randolph, 8 Tex. 191, the court said:

> It seems, then, now to be beyond question that parol evidence is admissible, to prove that a deed or instrument, absolute on its face, was executed and delivered, upon certain trusts not reduced to writing, and which the grantee promised to perform, and that the same may be established.

The court, after referring to Carter *v.* Carter, 5 T. R; Stamper *v.* Johnson, 3 T. R., and other cases, said that, although the question whether a deed, absolute on its face, was a mortgage, had arisen oftener than the question whether such a deed was a deed in trust, the principle,

involved in both cases, was the same, and that, if evidence was admissible to show that one was a mortgage, evidence was also admissible to show that the other was a deed in trust.

In Gay *v.* Hunt, 1 Murphey, 141, a person, being subject to intoxication and therefore fearing imposition, conveyed his property, by an absolute deed, to another, for the benefit of his child, a minor; but no declaration, to this effect, appeared in the deed. Parol evidence was admitted to prove the trust. In Clark *v.* Haney, 62 Tex. 511, a deed of mortgaged lands was executed by the mortgagors, husband and wife, to the mortgagee, upon the mortgagee's oral promise, to the wife, to sell the land, discharge the debt, and pay back the surplus, or reconvey any portion unsold. The deed was held to be a deed in trust. The court said:

> Even in those states where the seventh section of the statute of frauds, 29 Car. 2, Chap. 3, forbidding express verbal trusts, is in force, promises of this nature have been enforced; deeds apparently absolute have had parol trusts engrafted upon them, to prevent fraud, although the trust was express and, as such, forbidden by the statute (Jones *v.* McDougal, 32 Miss. 179; Arnold *v.* Cord, 16 Ind. 177; Nelson *v.* Wornall, 20 Iowa, 469; and see Babcock *v.* Wyman, 19 How. 289), and parol express trusts are not forbidden.
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> This section is not in force in our state, and it is the current of decision, here, that parol evidence is admissible to prove that a deed, absolute on its face, was executed and delivered upon certain trusts, not reduced to writing, and which the grantor promised to perform. Mead *v.* Randolph, 8 Tex. 191; McClenny *v.* Floyd, 10 Tex. 159; Gibbs *v.* Penny, 43 Tex. 560.

Is it contended that, although a deed, on its face presumptively absolute, may be shown to be a deed in trust, a cession by treaty, on its face presumptively absolute, cannot be proved to be a cession in trust? A cession by treaty is a sovereign's deed. So far as the question now under consideration is concerned, it is like a citizen's deed. And a sovereign, who voluntarily enters a court as a party, surrenders, *pro hac vice*, his sovereign char-

acter, and subjects himself to the rules of law and equity, which apply to other parties.

Where the terms of a stipulation admit of more senses than one, the promise is to be performed in that sense in which the promiser understood, at the time, that the promisee received it. It is not the sense, in which the promiser actually intended it, that always governs the interpretation of a promise; nor is it the sense in which the promisee actually received the promise. It is the sense in which the promiser and promisee both understood the promise,—in which the promiser made and the promisee accepted it.

In the interpretation of this treaty, the following rules of international law are to be observed: (1) The intention of the parties must prevail; a disposition of territory will have the effect literally implied in the terms used, if such shall appear to have been the intention of the parties; but its signification will be enlarged, or restricted, if it shall appear that the parties, at the time, so understood it. (2) An interpretation, which leads to an absurdity, is to be rejected. The same rules of interpretation are to be applied to treaties as to other contracts, United States *v.* Percheman, 7 Pet. 51; Wheaton Int. Law, P. 3, c. 2, § 17; Gardner, Inst., c. 12, § 13.

In re Ross, 140 U. S. 453, the court said:

> it is a canon of interpretation to so construe a law, or a treaty, as to give effect to the object designed, and, for that purpose, all of its provisions must be examined in the light of attendant and surrounding circumstances. To some terms and expressions a literal meaning will be given, and to others a larger and more extended one. The reports of adjudged cases and approved legal treatises are full of illustrations of the application of this rule. The inquiry, in all such cases, is as to what was intended in the law by the legislature, and in the treaty by the contracting parties.

In Geoffroy *v.* Riggs, 133 U. S. 258, the supreme court was called upon to interpret the treaty of February 23,

1853, between the United States and France. That treaty contained the following clause:

In all the states of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property, by the same title, and in the same manner as the citizens of the United States.

The question, in the case, was whether citizens of France could inherit real property in the District of Columbia. The court held that, within the meaning of the treaty, the District of Columbia was one of the "states of the union."

Vattel says:

Since the sole object of the lawful interpretation of a deed ought to be the discovery of the thoughts of the author or authors of that deed, whenever we meet with any obscurity in it, we are to consider what probably were the ideas of those who drew up the deed, and to interpret it accordingly. This is the general rule for all interpretations. It particularly serves to ascertain the meaning of particular expressions, whose signification is not sufficiently determinate. Pursuant to this rule, we should take those expressions in their utmost latitude, when it seems probable that the persons speaking had in contemplation everything which, in that extensive sense, they are capable of designating; and, on the other hand, we ought to restrict their meaning, if the author appears to have confined his idea to what they comprehended, in their more limited signification. Let us suppose that a husband has bequeathed to his wife *all his money*. It is required to know whether this expression means only his ready money, or whether it extends also to that which is lent out, and is due on notes and other securities. If the wife is poor,—if she was beloved by her husband,—if the amount of the ready money be inconsiderable, and the value of the other property greatly superior to that of the money, both in specie and in paper,—there is every reason to presume that the husband meant to bequeath to her, as well, the money due to him, as that actually contained in his coffers. On the other hand, if the woman be rich,—if the amount of the ready specie be very considerable, and the money due greatly exceeds, in value, all the other property,—the probability is that the husband meant to bequeath to his wife his ready money only.

By the same rule we are to interpret a clause in the utmost latitude that the strict and appropriate meaning of the words will admit, if it appears that the author had in view everything which that strict and appropriate meaning comprehends; but we must interpret it in a more limited sense, when it appears probable that the author of the clause did not mean to extend it to everything which the strict propriety of the terms might be made to include. As, for instance, a father, who has an only son, bequeaths to the daughter of his friend *all his jewels*. He has a sword enriched with diamonds, given him by a sovereign prince. In this case, it is certainly very improbable that the testator had any intention of making over that honorable badge of distinction to a family of aliens.

The sword, therefore, with the jewels with which it is ornamented, must be excepted from the legacy, and the meaning of the words restricted to his other jewels. Vattel, Law of Nations, Book 2, c. 17, § 270.

If, however, the technical or other terms relate to things that have different degrees, we ought not scrupulously to adhere to definitions, but rather to take the terms in a sense agreeable to the context; for a regular definition describes a thing in its most perfect state; and yet it is certain that we do not always mean it in that state of its utmost perfection, when we speak of it. Now the interpretation should only tend to the discovery of the will of the contracting parties; to each term we should, therefore, affix that meaning which the party, whose words we interpret, probably had in contemplation. * * Id., § 277.

There is not, perhaps, any language that does not also contain words which signify two or more different things, and phrases which are susceptible of more than one sense. Thence arises ambiguity in discourse. * * The following is the rule that ought to direct the interpretation, in this as well as in the preceding case: We ought always to affix such meanings to the expressions as are most suitable to the subject or matter in question. For, by a true interpretation, we endeavor to discover the thoughts of the person speaking, or of the contracting parties in a treaty. Now it ought to be presumed that he who has employed a word, which is susceptible of many different significations, has taken it in that sense which agrees with his subject. Id. §§ 279, 280.

Every interpretation that leads to an absurdity ought to be rejected; or, in other words, we should not give to any piece a meaning from which any absurd consequences would follow, but must interpret it in such a manner as to avoid absurdity. * * The rule which we have just mentioned is absolutely necessary, and ought to be followed even when the text of the law or treaty does not, considered in itself, present either obscurity or ambiguity in the language. For it must be observed that the uncertainty of the sense we are to give to a law, or a treaty, does not solely proceed from the obscurity, or other defect, in the expression; but also from the limited nature of the human mind, which cannot foresee all cases and circumstance, nor take in, at one view, all the consequences of what is decreed or promised; and finally from the impossibility of entering into that immense detail. Laws and treaties can only be worded in a general manner; and it is the interpreter's province to apply them to particular cases, according to the intention of the legislature or of the contracting powers. Now, we are not, in any case, to presume that it was their intention to establish an absurdity; and, therefore, when their expressions, taken in their proper and ordinary meaning, would lead to absurd consequences, it becomes necessary to deviate from that meaning just so far as is sufficient to avoid absurdity. Id. § 282.

The reason of the law, or of the treaty,—that is to say, the motive which led to the making of it, and the object in contemplation, at the time,—is the most certain clue to lead us to the discovery of its true meaning. * * The consideration of the reason of a law, or promise, not only serves to explain the obscure or ambiguous expressions, which occur in a piece, but also to extend or restrict its several provisions, independently of the expressions, and in conformity to the intention and views of the legislature, or the contracting parties, rather than to their words. For, according to the remark of Cicero, the language invented to explain the will ought not to hinder its effect. Id. § 289.

Grotius says:

The best rule of interpretation is to guess at the will by the most probable signs, which signs are of two sorts, words and conjectures; which are sometimes considered separately, sometimes together. If no conjecture guides us otherwise, the words are to be understood according to their propriety, not the grammatical one, which regards the etymon and original of them, but what is vulgar and most in use; for use is the judge, the law and rule of speech. * * Conjectures are necessary when words and sentences are of several significations, which the rhetoricians call doubtful and ambiguous. * * The principal heads, from which these conjectures arise, are the matter, the effect, and the circumstances or connection. First. From the matter, as the word *day* (if a truce be made for thirty days) ought not to be understood of natural days, but of artificial ones, as agreeable to the subject-matter. So the word *giving* is taken for a forbearance, according to the nature of the affair it is employed in. So the word *arms* sometimes signifies instruments of war, sometimes armed soldiers, and is to be interpreted either in this or that sense as the matter in hand requires. Secondly. From the effect, where the main thing to be observed is whether the word, taken in its common sense, does produce an effect contrary to reason. For when a word is ambiguous, we must rather take it in that sense which is liable to no absurdity. Lastly. From the circumstances and connection of the words with others, either spoken in the same place, or by the same person. That which proceeds from the same will, though delivered in some other place, or upon some other occasion, has thereby a connection which gives room for reasonable conjectures; for, in a dubious case, the will is presumed to be consonant to itself. Grotius, Book 2, c. 16, §§ 1, 2, 4, 5.

On the other hand, words are to be taken even more strictly than the propriety will bear, if it be necessary in order to avoid an injustice or an absurdity; and without such a necessity, if there be a manifest equity or advantage in the restriction, we are to confine ourselves within the narrowest bounds of their propriety, unless circumstances persuade us otherwise. Id. § 12.

Rutherforth says:

Sometimes common usage has given two senses to the same word, one of which is more confined or includes fewer particulars; and this is called its strict sense; the other is more comprehensive, or includes more particulars; and this is called its large sense. Thus the word, "ware-house," is sometimes used in a large sense, to signify any place where a dealer in any sort of goods, or wares, lays them up, till he wants to bring them out to a place of sale; and it is likewise used in a strict sense, to signify the very place of sale; and then is not otherwise distinguished from a shop than as the former is a close and the latter an open place of sale. When we meet with a word of this sort, in a law, and are doubtful in which of the senses the legislator used it, we must have recourse to some other marks besides his words, to ascertain his meaning. Either of the senses is within the letter of the law, but, because other marks must be used to ascertain the meaning of the legislator besides his words, the interpretation is of the mixed sort.

Rutherforth, Inst., Book 2, c. 7, § 10.

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Public treaties are to be interpreted like other laws and contracts. Such is the inevitable imperfection and ambiguity of all human language that the mere words alone of any writing, literally expounded, will go a very little way towards explaining its meaning. Wheaton, International Law, Part 3, c. 2, § 17.

When the same provision, or sentence, expresses two meanings, that one which most conduces to carry into effect the end and object of the convention, should be adopted. Phillimore, sec. 73.

Treaties of every kind are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction, and course of reasoning, which we apply to the interpretation of private contracts. 1 Kent Comm. 174; Maryatt v. Wilson, 1 Bos. and Pull. 438, 439; Kent, International Law, 391.

If, as the supreme court has repeatedly held, a deed, absolute on its face, can be shown, by extraneous proof, to be a deed in trust; if it was legitimate for the supreme court to hold that the word "state," in the jurisdictional provision of the constitution, does not include the District of Columbia, but in the French treaty of February 23, 1853, does include the District of Columbia; if, as Vattel holds, evidence *aliunde* is admissible to show that a bequest, of *all* the testator's jewels, does not include the diamonds on the hilt of his sword, and that a bequest, of *all* the testator's money, does not include his money lent, but only the money in his coffers; if, as Grotius holds, it is legitimate for the courts to decide, upon evidence *aliunde*, whether the word, "day," used in a treaty, means day, as distinguished from night, or means the day of twenty-four hours, or whether the word "arms," in a treaty, means armed men, or merely weapons; if, as held by Rutherforth, it is competent to show whether the word, "warehouse," means a place for storage merely, or a place for both storage and sale; if, in the case at bar, it is not only competent, but absolutely necessary, to ascertain from outside proofs whether the Choctaws and Chickasaws have ceded to the United States dominion merely, or both dominion and property; if, as held by all the authorities, when a word,

employed in an instrument, has several meanings, it is admissible to show in which sense it was there used, it would seem to be competent, on the same ground of principle, to ascertain from outside evidence whether this cession is an absolute conveyance, a mortgage, or a cession in trust.

The other material statements of the dissenting judge, adverse to the title of the appellees, will be considered in connection with the subjects to which they respectively relate.

One of the numerous proofs, presented by the Choctaw and Chickasaw nations, to show that the cession under consideration is a cession in trust, is the trustee's acknowledgment of the trust, which acknowledgment will be hereafter considered.

If the common law relating to trusts, as it stood before the enactment of the statute of frauds, is applicable to the treaty, the trust, in this case, not only may have been created by parol, but may also be proved by parol. If the common law, as modified by the statute of frauds, is applicable, the trust may have been created by parol, but must be proved by written evidence. But if the public law of nations is applicable to this treaty, then the trust may have been created by parol, and can also be proved by parol. For, assuredly, the public law cannot be more narrow, or technical, than the common law. But let us assume, for the purpose of the argument, that the United States and the Choctaw and Chickasaw nations have accepted the common law, modified by the statute of frauds, as the rule for the determination of the question whether the treaty of 1866 effected an absolute cession or a cession in trust. It will be found that the trust, in this case, has been, not only proven by written evidence, but also created by written instruments.

When the trustee acknowledges the trust in writing, even under the statute of frauds, that acknowledgment becomes an accomplished fact. His character as trustee is fixed. It is not competent for him, when called to account by the beneficiary of the trust, to turn around and deny that he is a trustee. He will, notwithstanding that denial, still be a trustee. His assertion, that he is not a trustee, will be as futile as would be his assertion that two and two are not four, but are five. It is the same whether the trustee is a sovereign in court, or a citizen in court. When Congress, in the act of March 3, 1891, declared the United States to be a trustee, that relation was fixed. If, in subsequent legislation, Congress had declared that the United States was not a trustee, the United States would, nevertheless, still have remained a trustee.

First.

The Choctaw and Chickasaw Title.

The Choctaws and Chickasaws contend that the cession, stipulated in the first clause of the third article of the treaty of 1866, was a conveyance in trust—a conveyance not absolute, but conditional,—the condition being that the United States, the grantee of the trust estate, should "settle" friendly Indians on the ceded lands, the government being empowered, within certain limits, to select the friendly Indians to be located thereon, in execution of the trust.

This interpretation of the treaty seems to be supported by the rule of judicial interpretation applicable to Indian treaties; by the acts and relations of the parties, prior to the Fort Smith council; by the proceedings of that council; by certain provisions of the treaty; by the subse-

quent action of the executive department of the government; by the subsequent action of Congress; and by the consideration that the cession of 1866, if an absolute conveyance, would have involved great injustice to the Choctaws and Chickasaws.

I.

The rule of judicial interpretation applicable to Indian treaties.

The supreme court has repeatedly held that treaties with Indian nations are to be liberally construed in favor of the Indians;—that the relation existing between the United States and these nations, which has been likened to the relation between guardian and ward, necessitates this rule of interpretation. In Choctaw Nation *v.* United States, 119 U. S. 1, 27, the court said:

> As was said by this court recently in the case of United States *v.* Kagama, 118 U. S., 375, 383: "These Indian tribes are the *wards* of the nation; they are communities *dependent on the United States;* dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. *From this very weakness and helplessness*, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the *duty of protection* and with it the power. This has always been recognized by the executive and by congress, and by this court whenever the question has arisen." It had accordingly been said in the case of Worcester *v.* Georgia, 6 Peters, 515, 583: "The language used in treaties with the Indians should never be construed to their prejudice. * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."
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> The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the control of the former, and which, while it authorizes the adoption, on the part of the United States, of such a policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing;

and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules, framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws.

The rules to be applied, in the present case, are those which govern public treaties, which, even in controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations. And it is the treaties made between the United States and the Choctaw nation holding such a relation, the assumptions of fact and of right which they pre-suppose, the acts and conduct of the parties under them, which constitute the material for settling the controversies which have arisen under them. The rule of interpretation, already stated as arising out of the nature and relation of the parties, is sanctioned and adopted by the express terms of the treaties themselves. In the 11th article of the treaty of 1855, the government of the United States expresses itself as being desirous that the rights and claim of the Choctaw people, against the United States, "shall receive a just, fair and liberal consideration." * *

The counsel for the appellants contend that this rule of interpretation is not applicable to the treaty of 1866, because, as they assert, the Choctaws and Chickasaws were not "unlettered people," in 1866; but were "capable of dealing at arm's length" with the United States. They assume that the fact, which fixed the relation defined by the court, was the "illiteracy" of the Choctaws and Chickasaws. This is evidently a mistake. The main facts, which fix this relation, are, on the one side, the *weakness, helplessness* and *dependence* of the Indians, and, on the other, the *paramount power* and *sovereignty* of the United States. The Choctaws and Chickasaws were, in 1866, as in 1820, weak dependent tribes. They were absolutely in the power of the government of the United States. With this power was coupled a correlative obligation of the government, not only to protect them from wrongs at the hands of others, but also to abstain itself from taking advantage of them, by means of harsh and overreaching bargains.

The reason, for the application of the rule of interpre-

tation of Indian treaties adopted by the supreme court, was very much stronger, in the case of the treaty of 1866, than in the case of the treaty of 1820; for, at the commencement of the negotiation of the treaty of 1866, the Choctaws and Chickasaws *were placed under duress* by the authorities of the United States. On the first day of the Fort Smith council, September 8, 1865, the commissioners addressed the Indians as follows:

> Portions of several tribes and nations have attempted to throw off their allegiance to the United States, and have made treaty stipulations with the enemies of the government, and have been in open war with those who remained loyal and true, and at war with the United States. All such have rightfully *forfeited all annuities and interests in lands* in the Indian territory. But, with the return of peace, after subduing and punishing severely, in battle, those who caused the rebellion, the president is willing to hear his erring children in *extenuation of their great crime.* (Appendix to Record, 1867, 163.

On the next day, the commissioners addressed the Indians as follows:

> The following-named nations and tribes have, by their own acts, by making treaties with the enemies of the United States, at the dates hereafter named, *forfeited all right to annuities, lands and protection* by the United States: The different nations and tribes having made treaties with the rebel government are as follows, viz: The Creek nation, July 10, 1861; Choctaws and Chickasaws, July 12, 1861; Seminoles, August 1, 1861; Shawnees, Delawares, Wichitas, and affiliated tribes, residing in leased territory, August 12, 1861. * *
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> We, as representatives of the president, are empowered to enter into new treaties with the proper delegates of the tribes located within the so-called Indian territory, and others above named, living west and north of the Indian territory. Such treaties *must* contain substantially the following stipulations. * * Rec. 74, 75.

Inasmuch as nations, if they enter courts of equity, must appear therein, not as sovereigns, but as individuals, it would seem that a court of equity should scrutinize contracts between absolute sovereignties and dependent tribes as liberally, in favor of the latter, as contracts between guardian and ward, in favor of the ward, and should enforce as rigid an accountability for property of the dependent tribe, acquired by the sovereign, as for the ward's property acquired by the guardian.

II.

The acts and relations of the parties prior to the Fort Smith council.

It seems to me that the circumstances which attended the emigration of the Choctaws and Chickasaws to the Indian Territory, the guaranties which induced them to emigrate, and their relations to the United States, prior to the Fort Smith council, conspire to prove that the cession of 1866 could not have been intended, either by the Indians, or by the United States, as an absolute conveyance exempt from the trust, or condition, to settle friendly Indians on the ceded land.

The aboriginal title of the Choctaws to the land in Mississippi, which they ceded to the United States, in 1820, is carried back, by authentic history, more than 200 years. So, also, is the aboriginal title of the Chickasaws to the lands in Mississippi, Tennessee, and Alabama, which they ceded to the United States in 1832. More than 100 years ago the boundaries of these respective nations were defined in treaties with the United States. The area of the Choctaw lands exceeded 15,000,000 acres. The territory of the Chickasaws was more extensive than that of the Choctaws. Their governments were known to history more than a century before the government of the United States existed.

In 1803 Bonaparte, then first consul of France, ceded the province of Louisiana to the United States. That province extended from the Mississippi river westward to the Rio Bravo del Norte and Rocky Mountains, and from the Gulf of Mexico northward beyond the fortieth degree of north latitude. It included the territory subsequently ceded to the Choctaws by the United States.

In 1820 the demand of citizens of the United States for Choctaw lands, in Mississippi, had become well nigh irresistible, and the Choctaws were induced to cede to the United States a portion of their Mississippi lands described by metes and bounds, in exchange for a tract of land, described by metes and bounds, west of the Mississippi river. The eastern boundary of the cession to the Choctaws, as prescribed in the treaty, was a line extending from the intersection of the southern boundary of the Cherokee country with the Arkansas river, to a point on the Red river three miles below the mouth of Little river; its northern boundary the Arkansas and Canadian rivers; its southern boundary the Red river; and its western boundary a line extending due south from the source of the Canadian to Red river.

During the ten years, which followed the cession of 1820, the demand of the citizens of Mississippi for Choctaw lands became more and more urgent; and the legislature of that state, in order, apparently, to make their residence therein intolerable to the Choctaws, extended over them the laws of the state. The result was that in 1830, the United States secured another treaty, by which the Choctaws ceded to the United States all the lands still held by them, in the state of Mississippi. As stated by the court in Choctaw Nation *v.* United States, 119 U. S. 1, these lands amounted to 10,000,000 acres. No land was ceded to the Choctaws by this treaty. It was stated, in the preamble of the treaty, that the president had declared his inability to "protect the Choctaw people from the operation" of the laws of the state of Mississippi, and that the object of the treaty was to enable the Choctaws to "live under their own laws." As the court said, in the case above mentioned:

Great pressure had to be brought to bear upon the Indians to effect their removal; and the whole treaty was evidently and purposely executed, not so much to secure to the Indians the rights, for which they had stipulated, as to effectuate the policy of the United States in regrad to their removal. The most noticeable thing, upon a careful consideration of the terms of this treaty, is that no money consideration is promised, or paid, for a cession of lands, the beneficial ownership of which is assumed to reside in the Choctaw nation, and computed to amount to over ten millions of acres.

But the treaty held out to the Choctaws an inducement for the cession, and for their emigration to the west, which was more effective than any compensation, in money, could have been. It opened to them a way of escape from the galling control of the whites, and guarantied to them the enjoyment of unrestricted self-government, in the wilderness west of the Mississippi. The treaty contained a provision which was to them of the greatest possible moment. It was this:

Art. IV. The government and people of the United States are obliged to secure, to the said Choctaw nation of red people, the jurisdiction and government of all persons and property, that may be within their limits west, so that no territory, or state, shall ever have a right to pass laws for the government of the Choctaw nation of red people and their descendants, and that no part of the land granted them shall ever be embraced in any territory, or state; but the United States shall forever secure said Choctaw nation from and against all laws, except such as, from time to time, may be enacted in their own national councils, not inconsistent with the constitution, treaties and laws of the United States, except such as may and which have been enacted by congress, to the extent that congress, under the constitution, are required to exercise a legislation over Indian affairs. G. Appendix, 1st

This article secured to the Choctaws rights which they have prized more highly and guarded with more intense solicitude than any other possession.

In 1832 conditions, similar to those which occasioned the emigration of the Choctaws to the country west of the Mississippi river, constrained the Chickasaws to sell their lands located in the states of Mississippi, Tennessee, and Alabama. In 1834 another treaty was made with the Chickasaws. It contains the following provision:

Art. 2. The Chickasaws are about to abandon their homes, which they have long cherished and loved; and, though hitherto unsuccessful, they still hope to find a country, adequate to the wants and support of their people, somewhere west of the Mississippi, and within the territorial limits of the United States; should they do so, the government of the United States hereby consent to protect and defend them against the inroads of any other tribe of Indians, and from the whites; and agree to keep them without the limits of any state or territory.

Subsequently they emigrated to the country of the Choctaws west of the Mississippi. In 1837 the Chickasaws, with the consent of the United States, purchased an undivided one-fourth interest in the land of the Choctaws.

In 1854 numerous tribes, or bands, of wandering Indians, including the Wichita and affiliated bands, who are parties to this cause, resided in the state of Texas. Many of them were horse-thieves and murderers. The citizens of Texas were anxious to be relieved of their presence. No lands were accessible, for the colonization of these Indians, except the western portion of the country of the Choctaws. In 1855 the United States obtained, from the Choctaws and Chickasaws, a lease of that part of their country which was included between the 98th and 100th meridians. This land was leased for specific uses. The condition of the lease was that the land should be used for the permanent settlement of certain Indian tribes.

Meantime the country between the Red and Canadian rivers, west of the 100th meridian, which had been taken from the Choctaws and ceded to Spain, in 1821, had, upon the annexation of Texas, become again a part of the United States. The Choctaws then insisted that it was incumbent on the United States to make good the title conveyed to them in 1820; and in 1854 they importunately demanded repossession of the land. In response to this demand the United States, in the treaty of 1855, combined with the lease of the land between the

98th and 100th meridians the purchase of a relinquishment of the rights of the Choctaws in the land west of the 100th meridian. The dissenting judge says (p. 79) that this relinquishment was "but a correction of the cession of 1820, in accordance with the intention of the parties." He is evidently mistaken. The treaty embraced the following articles:

Art. 7. So far as may be compatible with the constitution of the United States, and the laws, made in pursuance thereof, regulating trade and commerce with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits; excepting, however, all persons, with their property, who are not, by birth, adoption, or otherwise, citizens or members of either the Choctaw or Chickasaw tribe.

Art. 9. The Choctaw Indians do hereby absolutely and forever quitclaim and relinquish to the United States all their right, title, and interest in and to any and all lands west of the one hundredth degree of west longitude, and the Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude for the permanent settlement of the Wichita and such other tribes or bands of Indians as the government may desire to locate therein, excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas river and whose permanent locations are north of the Canadian river, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas, which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the president for their government: *Provided, however*, That the territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore.

Art. 10. In consideration of the foregoing relinquishment and lease, and, as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct. (App. 27, 28.

It was provided in articles 2, 3, and 9 of this treaty, not only that the leased land should remain open to settlement by the Choctaws and Chickasaws, but also that it should be a part of the Choctaw district, and that the Choctaw government should have jurisdiction over all Choctaws and Chickasaws residing therein, and, moreover, that the president should make no rule or regula-

tion, for the government of other Indians located therein, inconsistent with the rights and interests of the Choctaws and Chickasaws.

In 1859 agents of the United States located the Wichita and affiliated bands on a tract of 154,093 acres of land in the northwestern corner of the so-called Wichita reservation, the entire area of that reservation amounting to 743,610 acres. The Wichita reservation is located between the 98th and 100th meridians in the northeast corner of the district, which was leased by the Choctaws and Chickasaws to the United States, in 1855. Soon after the commencement of the late civil war, these Indians went to the state of Kansas, whence they returned, at the close of the war.

In 1864 new conditions confronted the government. It seemed necessary, not only to secure the right to locate Indians in the leased district, *without regard to their former residence or ranges*, but also to secure the right to locate such Indians on the lands of the Cherokees, Creeks and Seminoles. By the treaty of 1855 the United States had already acquired, from the Choctaws and Chickasaws, the right to locate, in the leased district, Indians whose residence and ranges were within certain designated limits; and the instrument, which secured this right, clearly defined the purpose for which it was granted and received. But this instrument was only a lease. In the character of lessee the United States could not make conveyances in fee to Indian colonists; and conveyances in fee were essential in a scheme for the permanent settlement of Indians on those lands. It was therefore important to substitute, for the lease of 1855, a cession in fee.

But the United States had never acquired the right to colonize Indians on lands of the Cherokees, Creeks, or

Seminoles. It, therefore, became important to secure, from those tribes also, conveyances in fee for the colonization of friendly Indians. Accordingly a council was convened at Fort Smith, on the 8th of September, 1865, which was attended by commissioners of the United States, and by representatives of seventeen tribes of Indians, including the Choctaws, Chickasaws, Cherokees, Creeks, and Seminoles; and negotiations were commenced, which culminated in the several treaties, of 1866, between the United States and the five civilized tribes.

The question now is whether the prior acts and relations of the parties tend to prove that the cession, made in the treaty of the Choctaws and Chickasaws, was a conditional and not an absolute conveyance. It will be shown that *not more* than $400,000, in money, has ever been paid, or promised to the Choctaws and Chickasaws, for the 7,713,239 acres of land embraced in the leased district. It will be shown that the sum of $300,000, mentioned in the treaty of 1866, was proposed as the consideration, not for the cession of the leased district, but for the grant of citizenship and forty acres of land to each of the Choctaw and Chickasaw freedmen. I assume, then, for the present, that the only money consideration ever paid, or promised, for the leased district, was a sum not exceeding $400,000, promised in the treaty of 1855.

But the consideration which had the greatest weight, with the Choctaws and Chickasaws, was the undertaking of the United States to locate Indians on the leased land. Their experience with their enterprising white neighbors, on their eastern and southern frontiers, had convinced them that it would be well to interpose a "buffer" of red men, on their western frontier, and, to that end, to secure from the United States an undertaking to settle Indians on the land, and to exclude white settlers therefrom.

Another consideration reconciling them to the lease was that, by its terms, 20,000 Choctaws and Chickasaws retained their right to settle on the leased lands, and, while residing there, were to be subject to the jurisdiction of the Choctaw government. Still another element of the consideration was the promise that, for the government of the other Indians to be located on the land, by the United States, the president should make no regulations inconsistent with the rights and interests of the Choctaws and Chickasaws.

If the cession of 1866 was an absolute cession, every element of the consideration, for which the Choctaws and Chickasaws had, from first to last, parted with the land, was swept away, excepting only the payment, *not exceeding* $400,000, made in 1855. The obligation of the United States to locate Indians on the land was extinguished. It was to be used for general settlement, or for any other purpose, at the discretion of the government. The Choctaws and Chickasaws were excluded from the land. The Choctaw nation was deprived of jurisdiction of settlers already there. The leased land ceased to be a part of the Choctaw district. The obligation of the United States to make no regulations, for the government of Indians in the district, inconsistent with the rights and interests of the Choctaws and Chickasaws, was extinguished.

Whatever was paid for the lease, in 1855, was paid for a lease subject to all these conditions; and, if the cession of 1866 was an absolute conveyance, all these conditions were swept away, and the United States became the beneficial owner of the entire leased districts, without paying any consideration whatever for the substitution of the beneficial ownership of the land, in lieu of the conditional leasehold interest acquired by the treaty of 1855.

But a court of equity cannot uphold a purchase, by a

guardian from a ward, of an estate worth many millions, for a sum *not exceeding* $400,000. Unless some additional consideration can be shown, the purchase will be set aside. Only one other consideration is to be found in the prior acts and relations of the parties. That is the condition that the United States shall settle friendly Indians on the lands. And that condition transforms the cession from an absolute into a conditional conveyance,—from an absolute cession into a cession in trust.

In view of the facts above stated, it would seem to be inconceivable that the Choctaws and Chickasaws could have intended, by an absolute cession, in 1866, of the land leased in 1855, without any consideration additional to that paid for the lease, to invest the United States with the absolute beneficial ownership of 7,713,239 acres of land, which was worth, at the price fixed by the act of May 20, 1862, from $9,000,000 to $19,000,000. It seems incredible that they could have intended, on such terms, to surrender their title to, and their guarantied jurisdiction over more than one-third of their entire territory, and to divert it from Indian occupancy, to which it had been dedicated, to general settlement, under the land laws of the United States. It seems, if possible, still more incredible that the treaty-making authorities of the United States could have intended to exact such a hard bargain from these Indians, who not only were dependent wards of the nation, but had *actually been placed under duress*, at the commencement of the negotiation of the treaty, and constrained to accede to terms proposed by the United States.

III.

The proceedings of the Forth Smith Council.

The trust in the case now under consideration, although it had its incipiency in the treaty of 1855, first appeared,

as a feature of the cession of 1866, in a written submission by the United States, to the Choctaw and Chickasaw nations, of a definite proposition, which was also an ultimatum, as one of the bases of a contemplated treaty between the United States and those two nations, followed by an acceptance of the proposition so submitted

The treaty was signed at Washington in 1866, but the preliminary negotiations were conducted, and the substance of its provisions determined on, at Fort Smith, in 1865. It was not signed at Fort Smith, in 1865, because the Indian commissioners had not been authorized, by their respective governments, to sign it. Such authority was subsequently conferred upon commissioners of the respective nations, and the treaty itself was signed the next year, at Washington, without further negotiation as to the use for which the land was ceded, or as to the consideration for the cession.

The following documents, outside the treaty, and prior, in date, to its formal execution, constitute legitimate aids in its interpretation :

On pages 33, 34, of the report of the commissioner of Indian affairs, for 1864, appears this statement:

> Under these circumstances, I feel that I cannot too strongly urge the importance of preserving the Indian country for the use of the Indians alone, and in all treaties or other arrangements, which may hereinafter be made with its former owners insisting upon, and, if need be, enforcing such terms as will secure ample homes within that country for all such tribes, as, from time to time, it may be found practicable and expedient to remove thereto.

The commissioners of the United States, in their address to the delegates of the Indian nations, at the council held at Fort Smith, September 9, 1865, which address is now on file in the Indian office, said :

> Brothers: After considering your speeches, made yesterday, the commissioners have decided to make the following reply and statement of the policy of the government.

Brothers: We are instructed, by the president, to negotiate a treaty, or treaties, with any, or all, of the nations, tribes, or bands of Indians, in the Indian Territory, Kansas or the plains west of the Indian Territory and Kansas.

* * * * * * * *

The president is anxious to renew the relations, which existed at the breaking out of the rebellion.

We, as representatives of the president, are empowered to enter into new treaties, with the proper delegates of the tribes located within the so-called Indian Territory, and others above named, living west and north of the Indian Territory.

Such treaties *must* contain substantially the following stipulations:

1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.

2. Those settled in the Indian Territory must bind themselves, when called upon by the government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory, and with the United States.

3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes, on an equal footing with the original members, or suitably provided for.

4. A stipulation, in the treaties, that slavery or involuntary servitude shall never exist, in the tribe, or nation, except in punishment of crime.

5. A portion of the lands, hitherto owned and occupied by you, *must be set apart for the friendly tribes, now in Kansas and elsewhere*, on such terms as may be agreed upon by the parties and approved by government, or such as may be fixed by the government.

6. It is the policy of the government, unless other arrangements be made, that all the nations and tribes, in the Indian Territory, be formed into one consolidated government, after the plan proposed by the senate of the United States for organizing the Indian Territory.

7. No white person, except officers, agents, and employes of the government, or of any internal improvement authorized by the government, will be permitted to reside in the territory, unless formally incorporated with some tribe, according to the usages of the band.

Brothers: You have now heard and understand what are the views and wishes of the president; and the commissioners, as they told you yesterday, *will expect definite answers* from each of you, upon the questions submitted.

This address, in manuscript, in the Indian office, bears the following indorsement:

We propose to renew the treaty stipulations that existed previous to, or at the breaking out of, the rebellion, so far as regards the annuities.

The government will insist on purchasing a portion of their lands for the settlement of friendly Indians.

No part of any moneys expended by the president, in providing for the relief of destitute Indians, which were reduced to want on account of their friendship for the government, will be refunded.

A stipulation of general amnesty must be incorporated, and no individual shall be proscribed, or any act of confiscation, or forfeiture, passed,

against those who remained friendly to the U. S.: but they shall enjoy equal privileges with the other members of the nations. Rec. 74, 75.

To this address the Choctaw and Chickasaw delegates made a reply, which is now on file in the Indian office, and contains the following paragraphs:

The committee, on the part of the Choctaws and Chickasaws, reply to the propositions made on the part of the United States, as the basis of new treaties that * * *

On certain terms, on which we can doubtless agree with you, *we are willing to admit the settlement of other tribes within our territory, as proposed in the 5th article.* Rec. 76.

The following reply to the address of the United States commissioners is also on file in the Indian office:

We, the delegation on the part of the loyal element of the Choctaw people, came here with the expectation of meeting our southern brethren here, and to see what sort of a treaty would, or could, be made with the government of the United States. * * *

In answer, therefore, to your propositions to the several tribes of Indians, *we say that the first, second, third, fourth fifth, and sixth articles meet our approval.* We respectfully suggest that the seventh article may be changed to read thus:

"No white person, except officers, agents, and employés of the government or of any internal improvement company authorized by the government of the United States; also no persons of African descent, except our former slaves or free persons of color who are now or have been residents of the territory, will be permitted to reside in the territory, unless formally incorporated with some tribe according to the usages of the band." Rec. 77, 78.

Mr. Cooley, the president of the commission, said to the delegates, or agents, of the Indians:

The agents will be supplied with printed copies of the address, and *are requested to go, with an interpreter, to their respective tribes, for the purpose of fully explaining what is said there.* Rec. 154.

The minutes of the council for September 21, 1865, contain the following entry:

At 2 o'clock p. m. the council met, pursuant to adjournment. Called to order by President Cooley. Commissioner Parker stated that the joint committee of the Choctaw and Chickasaw delegations had reported to the committee of the commission certain amendments and modifications of the proposed treaty; that the commission had had the same under consideration, and the commissioners declined to accede to them, or to change, in any respect, the treaty as submitted. The delegations would be furnished with a copy of the treaty, and, whenever they determined to approve it, by notifying the Commissioner of Indian Affairs of the fact, they would be invited to come to Washington to consummate the treaty.

In anticipation of the speedy termination of the council, Commissioner Parker, on behalf of the commission, returned thanks to the various delegations then present, for their attendance, and wished them a happy journey home.

After some congratulatory remarks, by Delegate R. M. Jones, R. Field, E. C. Boudinot and Commissioner Cooley, President Cooley adjourned the council and the commission, to meet again, at the call of the secretary of the interior.

CHARLES E. MIX, *Secretary.*

This treaty, which the commissioners peremptorily refused to modify, and which was taken by the Choctaw and Chickasaw delegates to their respective nations, contained the following article:

Article 5. The Choctaw and Chickasaw tribes agree to a modification of the ninth article of the treaty concluded, in the city of Washington, on the 22d of June, A. D. 1855, by which they agree that all of that portion of their common territory west of the 98th degree of west longitude, leased to the United States, may be used for the permanent settlement of the Wichita and such other tribes, or bands, of Indians, as the government may desire to locate thereon, *without exception, or restriction, as to the character of the tribes.*

The ninth article of the treaty of 1855 excluded from the leased district all the Indians of New Mexico, and all those whose usual ranges were then north of the Arkansas river, and whose permanent locations were north of the Canadian. But that article, as modified by this fifth article of the proposed treaty, provided for the location, in that district, of any tribe which the government might desire to locate therein; and the United States expressly and imperatively required that the treaty should embrace this provision.

The proceedings of the Fort Smith council appear at pages 34, 296 and 312 of the report of the commissioner of Indian affairs for the year 1865.

IV.

The provisions of the treaty.

The treaty, all its provisions being considered, shows, upon its face, that the cession was, not an absolute, but

a conditional conveyance. It contains the following provisions:

Article 3. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, provided that the said sum shall be invested and *held by the United States* at an interest not less than five per cent., in trust for the said nations *until the legislatures of the Choctaw and Chickasaw nations, respectively, shall have made such laws, rules, and regulations* as may be necessary to give all persons of African descent resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by or belonging to said nations, respectively, and also to give to such persons who are residents, as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided, and immediately *on the enactment of such laws, rules, and regulations* the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter, less such sum, at the rate of one hundred dollars *per capita*, as shall be sufficient to pay such persons of African descent before referred to as, within ninety days after the passage of such laws, rules, and regulations, shall elect to move, and actually remove, from the said nations respectively. And *should the said laws, rules, and regulations not be made* by the legislatures of said nations, respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper, the United States agreeing, within ninety days from the expiration of said two years, *to remove from said nations all such persons of African descent as may be willing to remove*, those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars or any part thereof, but shall be upon the same footing as other citizens of the United States in said nations.

Article 10. The United States reaffirms all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw nations, entered into prior to the late rebellion, and in force at that time, not inconsistent herewith; and further agrees to renew the payment of all annuities and other moneys accruing under such treaty stipulations and acts of legislation from and after the close of the fiscal year ending on the thirtieth of June, in the year eighteen hundred and sixty-six.

Article 11. * * *Should the Choctaw and Chickasaw people*, through their respective legislative councils, *agree to the survey and dividing their land* on the system of the United States, the land aforesaid, east of the 98th degree of west longitude, shall be, in view of the arrangements hereinafter mentioned, surveyed, and laid off in ranges, townships, sections and parts of sections: * *

Article 12. The maps of said surveys shall exhibit, as far as practicable, the outlines of the actual occupancy of members of the said nations, respectively, and when they are completed, shall be returned to the said land office, at Boggy Depot, for inspection by all parties interested, when *notice for ninety days* shall be given of such return. * *

Article 15. *At the expiration of the ninety days' notice aforesaid, the selection*, which is to change the tenure of land, in the Choctaw and Chickasaw nations, from a holding in common, to a holding in severalty, *shall take place*, when every Choctaw and Chickasaw shall have the right to one quarter section of land. * *

Article 25. During ninety days from the expiration of ninety days' notice aforesaid, the Choctaws and Chickasaws shall have the exclusive right to make selections, as aforesaid. * *

Article 30. The Choctaw and Chickasaw nations shall receive into their respective districts, east of the ninety-eighth degree of west longitude in the proportion of one-fourth in the Chickasaw, and three-fourths in the Choctaw nation, *civilized Indians, from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory*, not exceeding 10,000 in number, who shall have, in the Choctaw and Chickasaw nations, the same rights as the Choctaws and Chickasaws, of whom they shall be the fellow-citizens, governed by the same laws, and enjoying the same privileges, with the exception of the right to participate in the Choctaw and Chickasaw annuities and other moneys, and in the public domain, should the same, or the proceeds thereof, be divided per capita among the Choctaws and Chickasaws, and, among others, the right to select land, as herein provided for Choctaws and Chickasaws, *after the expiration of the ninety days*, during which the selections of lands are to be made, as aforesaid, by said Choctaws and Chickasaws. * *

Article 31. And whereas some time must necessarily elapse *before the surveys, maps, and selections*, herein provided for, *can be completed*, so as to permit the said Kansas Indians to make their selections, in their order, *during which time* the United States may desire to remove the said Indians, from their present abiding places, it is hereby agreed that the said Indians may at once come into the Choctaw and Chickasaw nations, settling themselves temporarily as citizens of the said nations, respectively, upon such land as suits them and is not already occupied.

Article 37. In consideration of the right of selection, hereinbefore accorded to certain Indians other than the Choctaws and Chickasaws, the United States agree to pay to the Choctaw and Chickasaw nations, out of the funds of Indians removing into said nations, respectively, under the provisions of this treaty, such sum as may be *fixed by the legislatures of said nations*, not exceeding one dollar per acre. * *

Article 45. All the rights, privileges, and immunities heretofore possessed by said nations, or individuals thereof, or to which they were entitled under the treaties and legislation heretofore made and had in connection with them, shall be, and are hereby declared to be, in full force, so far as they are consistent with the provisions of this treaty.

Article 46. Of the moneys stipulated to be paid to the Choctaws and Chickasaws under this treaty for the cession of the leased district, and the admission of the Kansas Indians among them, the sum of one hundred and fifty thousand dollars shall be advanced and paid to the Choctaws, and fifty thousand dollars to the Chickasaws, through their respective treasurers, as soon as practicable after the ratification of this treaty, *to be repaid out of said moneys or any other moneys of said nations in the*

hands of the United States; the residue, not affected by any provision of this treaty, to remain in the treasury of the United States at an annual interest of not less than five per cent., no part of which shall be paid out as annuity, but shall be annually paid to the treasurer of said nations, respectively, to be regularly and judiciously applied, under the direction of their respective legislative councils, to the support of their government, the purposes of education, and such other objects as may be best calculated to promote and advance the welfare and happiness of said nations and their people respectively. *Appropriations &c.*

Upon a careful examination of the treaty it will appear, I submit, that no consideration for the cession is *expressed* in the treaty, and also that the fifth of the Fort Smith propositions is not *expressly* incorporated into any of its articles. The sum of $300,000, named in the third article of the treaty, was not the consideration, or any part of the consideration moving from the United States to the Choctaw and Chickasaw nations, for the cession of the leased district. That article commences as follows:

The Choctaws and Chickasaws, in consideration of the sum of $300,000, hereby cede to the United States the territory west of the ninety-eighth degree west longitude known as the leased district.

This language, if disconnected with the context, obviously imports that it was the purpose of the parties to the treaty, that the United States should pay the sum of $300,000 to the Choctaws and Chickasaws as the consideration for the conveyance of this land. But the other provisions of the treaty show that such was not their purpose. This money was to remain in the treasury two years unless, before the expiration of that period, the Choctaws and Chickasaws should elect to confer, and should confer, upon their freedmen "*all the rights, privileges, and immunities (including the right of suffrage) of citizens of said nations*," except in their annuities, moneys, and public domain," and should also give to their freedmen,—men, women, and children,—each forty acres of land. If their freedmen, who were estimated to number 3,000, should emigrate, this sum of $300,000 was all to

be paid to them,—$100 to each emigrant. If none of the freedmen should emigrate, and if the Choctaws and Chickasaws should fail to confer upon each freedman citizenship and forty acres of land, the whole of the $300,000 was to remain the property of the United States. If a part only of the freedmen should emigrate, and the Choctaws and Chickasaws should grant citizenship and forty acres of land to those refusing to emigrate, the Choctaws and Chickasaws were to receive the balance of the $300,000, after deducting the amount paid to the emigrants. Only in the event that the Choctaws and Chickasaws should grant citizenship and forty acres of land to each of the freedmen, and all the freedmen should refuse to emigrate, was the sum of $300,000 to become wholly the property of the Choctaws and Chickasaws.

But this sum was not, nor was any part of it, to be paid to the Choctaws and Chickasaws, as the *consideration* for the cession of the leased district. It was to be paid to them as a consideration for the grant of forty acres of land and of citizenship, including the right of suffrage, to each of their freedmen.

In accordance with the stipulations of article 46, the United States loaned to the Choctaws and Chickasaws the sum of $200,000. This loan was to be repaid out of the $300,000 mentioned in the first article, if that money should become the property of the Choctaws and Chickasaws. If it should not become their property, the loan was to be repaid out of any funds of those nations in the treasury of the United States.

But the counsel for the appellants contended that the "fifth proposition" was embodied in articles 30, 31 and 37 of the treaty of 1866. In order correctly to understand this branch of the case, it will be necessary to consider this "fifth proposition," in connection with certain

provisions of the treaty of 1866. The following is the fifth proposition, in the form set forth by Mr. Cooley, president of the council, and commissioner of Indian affairs, on page 34 of his annual report for the year 1865.

A part of the Indian country to be set apart, *to be purchased*, for the use of such Indians, from *Kansas or elsewhere*, as the government may desire to colonize therein.

The following is the form reported on page 319 by Mr. Mix, the secretary of the council.

A portion of the lands, hitherto owned and occupied by you, must be set apart for the friendly tribes, *now in Kansas and elsewhere*, on such terms as may be agreed upon, by the parties, and approved, by the government, or such as may be fixed by the government. [sic.]

The proposition, in the second form above set forth, which, for the present, I will suppose to be the correct form, required lands to be set apart for two distinct classes of Indians, (1) friendly tribes *then* in Kansas, and (2) friendly tribes *then* located "*elsewhere*." The word "elsewhere" embraced any and all country, in which such tribes were *then* located, except the state of Kansas. This word being present in the fifth proposition, that proposition is obviously not embodied in article 30 of the treaty of 1866. For the provisions of that article have no applicability to tribes not located either in Kansas or north of the Indian Territory.

The assumption that the word "*elsewhere*" covered no localities within or west of the Indian Territory, but only localities north of that Territory, is not warranted by anything in the context of the fifth proposition, or in the proceedings of the Fort Smith council, or in the facts of the case. On the contrary, Mr. Cooley, the president of the commission, said to the Indians that the commissioners were empowered to treat with the delegates of the tribes located *within* the so-called *Indian Territory*, and others living *west and north* of that Territory. The Choc-

taws, Chickasaws, Cherokees, Creeks and Seminoles were not the only Indians, to whom the seven propositions were addressed. As shown on page 318 of the report of the commissioner of Indian affairs for 1865, these propositions were addressed to seventeen different tribes. Having enumerated these tribes, Mr. Cooley on the second day of the Fort Smith council said to the Indians:

> We, as representatives of the president, are empowered to enter into new treaties with the proper delegates of the tribes located within the so-called Indian Territory, and others, above named, living west and north of the Indian territory. Rec. 75.

He stated that the agents would be supplied with printed copies of the address; and they were requested to go with interpreters, to their respective tribes for the purpose of fully explaining what was said therein. Wichita delegates attended the council. So did the agent of the Wichita and affiliated bands.

The counsel for the appellants insisted that the leased district could not have embraced any of the land required, by the fifth proposition, to be set apart for friendly Indians, because that proposition required "a portion of the lands hitherto owned and *occupied*" by the Indians, to whom the seven propositions were addressed, to be set apart for friendly Indians. He regarded the word "occupied" as decisive on this point. He asserted that "it does not appear" that the Choctaws and Chickasaws "occupied any of the leased district," in 1866.

I think that he not only mistook the effect of the word "occupied," as used in this proposition, but also overlooked the circumstances which occasioned its use, as well as the facts connected with the occupancy of the leased district. He assumed that the import of the fifth proposition was that the lands, to be set apart for friendly Indians, should be, not only owned, but *actually* "*occupied*"

by the Indians who set them apart for that purpose. Now the Chickasaw district contains 4,650,935 acres of land. But in 1866 the Chickasaws, including men, women and children, numbered less than 4,650. There must have been, at that time, less than 1,500 Chickasaw families. If each family had "occupied" 500 acres, they would have occupied less than 750,000 acres,—less than one-sixth of the district. But, in fact, they must have occupied less than one-twelfth of their land. And yet, upon the assumption of the counsel for the United States, the portion, to be set apart for friendly Indians, was to be taken from the one-twelfth which they occupied, and not from the eleven-twelfths which they did not occupy.

Perhaps it will be said that if land was owned by *one* tribe, and not occupied by *another*, it was, in the sense of the fifth proposition, constructively, although not actually, occupied by the Indians who owned it. This would end the controversy, so far as the bulk of the leased district is concerned. For the Choctaws and Chickasaws owned the whole of the leased district, in 1866, and only a very small part of it was occupied by other tribes.

But counsel may contend that the so-called lease, of the land between the 98th and 100th meridians, to the United States, *per se* terminated the occupancy of the Choctaws and Chickasaws. This contention is inconsistent, not only with the general nature and scope of the lease, but also with particular words used therein, with other provisions of the treaty of 1855, and with provisions of the Choctaw constitution of 1860. The so-called lease amounted to nothing more than a permit to and undertaking by the United States to settle Indians on the land. It had not the qualities of an ordinary lease. The ordinary lease confers upon the lessee the right to occupy the land, and transfers the lessor's occupancy to the lessee.

But this so-called lease did not confer upon the United States the right ever to occupy the land,—did not transfer the occupancy of the Choctaws and Chickasaws to the United States. It merely authorized the United States to place Indians upon the land.

Upon the location of a tribe, or band, of Indians on any part of the land, by the United States, the occupancy of that part of the land, by the Choctaws and Chickasaws, was suspended. Until they were placed there, the occupancy of the Choctaws and Chickasaws, whatever it was, remained unchanged. The lease conferred upon the United States no power to make any change, in the status of the land, or in the relations of the Choctaws and Chickasaws thereto, otherwise than by placing Indians on the land. If the man who owns and occupies a farm, a part of which is wild land not in *actual* use, occupies the wild land, as well as the cultivated fields, certainly the Choctaws and Chickasaws, in 1855, occupied all the leased district, and in 1866, occupied all of that district, except the small portions occupied by other Indians.

The treaty of 1855, the very treaty by which the land, between the 98th and 100th meridians, was leased to the United States, provided that this land should be a part of the Choctaw district, accessible to Choctaw officers and Choctaw people. Article 2, of that treaty, having defined the boundaries of the Chickasaw district, as they now exist, article 3 was framed as follows :

Article 3. The remainder of the country held in common by the Choctaws and Chickasaws shall constitute the Choctaw district; and their officers and people shall, at all times, have the right of safe conduct and free passage through the Chickasaw district. Appendix, 87.

The first clause of this article made the land between the 98th and 100th meridians a part of the Choctaw district. The last clause was necessary, because the first clause placed the Chickasaw district between two parts of

the Choctaw district. Again, there is a provision in the eleventh article of the treaty of 1855, which, not only recognizes the continuance of the general occupancy of the Choctaw and Chickasaw nations, but continues the right of the citizens of those nations to settle on particular tracts:

Provided, however, the territory, so leased, *shall remain* open to settlement by Choctaws and Chickasaws, *as heretofore*.

Moreover, the Choctaw constitution of 1860 contains the following provisions:

District Boundaries.

For the convenience and good government of the people of the Choctaw nation, we do make, ordain and establish four districts, in this nation, to be known by the following names and boundaries, viz. Mosholatubbee district, Pushamataha district, Apuckshunnubbee district and Hotubbee district. * *

The boundaries of Hotubbee district shall be embraced within the limits of the ninety-eighth and one hundredth degree of west longitude, and between Red river and Canadian river, known as the "Lease Land."

Article 4, Judicial Department.

Section 2. Until Hotubbee district shall be duly organized, and officers elected therein, under this constitution, the supreme court shall be composed of three supreme judges, one to be chosen from Apuckshunnubbee district, one from Pushamataha district, and one from Mosholatubbee district, one of whom shall be styled chief justice and two of whom shall constitute a quorum to do business.

Article 7, General Provisions.

Section 1. Until Hotubbee district shall be duly organized, the principal chief of the Choctaw nation shall exercise such authority, over *the citizens of this nation, living in that district*, as he may deem expedient for the protection of person, life, and property.

These documents, taken together, *amount to a recital that the leased district was occupied, to a greater or less extent, by Choctaws;* and that recital is competent *prima facie* evidence of the fact recited. For when any fact of a public nature is relevant to the issue, any statement of it, made in a constitution, public law, or treaty, is relevant and competent *prima facie* evidence of such fact. Rex *v.* Francklin, 17 State Trials, 636; Rex *v.* Sutton, 4 Maule and Selwyn, 532.

The object which the commissioners had in view, in the use of the words "owned and occupied," in the fifth proposition submitted to the seventeen tribes, was not to exempt tribes, owning but not occupying lands, from the requirement to stipulate, in their treaties, to set apart portions of such lands for friendly Indians; but to exempt tribes, like the Wichita and affiliated bands, occupying but not owning lands, from the requirement to stipulate, in their treaties, to set apart portions of such land for friendly Indians. Such must be the effect of the use of these words. For this is the only rational explanation of their use. The requirement that a tribe should set apart a portion of the land, which it owned and occupied, but not a portion of the land, which it owned and did not occupy, would not have been a reasonable requirement. It would have imposed an obligation unnecessarily and uselessly burdensome. The reasonable requirement would have taken the opposite direction. If any discrimination was to be made, between lands owned and occupied and lands owned and not occupied, such discrimination, in order to be reasonable, must have subjected to contribution, not the occupied but the unoccupied lands.

The effect of this proposition, of article 11, to the Choctaw and Chickasaw legislatures, to admit civilized Kansas Indians to the Choctaw and Chickasaw country east of the 98th meridian, if it had been adopted by those legislatures, would have been, not to secure a transfer of the trust, of which the United States were trustees, from the leased district to the territory east of the 98th meridian, but only to enlarge the territorial area covered by the trust, so far as the Kansas Indians were concerned. The effect would have been, not to deprive the United States of the right to locate Kansas Indians in the leased district, but to secure, to the United States, additional land, for

the settlement of the Kansas Indians. Under article 3, the leased district would have still remained subject to the condition to settle Kansas Indians, as well as other Indians, on the land.

The eleventh article of the treaty submitted to the Choctaw and Chickasaw legislatures the determination of the question, whether the Choctaw and Chickasaw lands should be surveyed and allotted. In the same article, it was provided that if they should decide in favor of such survey and allotment, the survey should be made at the cost of the United States. In article 12, it was provided that maps of the surveys should be made and returned to the land office, at Boggy Depot, and that a notice of such return should be given for ninety days thereafter. In articles 15 and 25, it was provided that during ninety days, after the expiration of such notice, the Choctaws and Chickasaws should have the exclusive right to make their selections from the surveyed lands. And, in sections 1 and 30, it was provided that, *after the expiration* of the ninety days, during which the selections of land were to be made by the Choctaws and Chickasaws, the Kansas Indians should have a right to select lands. If the legislatures of the Choctaw and Chickasaw nations should decide to survey and allot their lands, the Kansas Indians were to become land owners and citizens in those nations. If the legislatures should decide not to survey and allot their lands, the Kansas Indians were to have no rights *under those articles*, in the Choctaw and Chickasaw nations.

But the counsel for the appellants contended that article 31 provided for the admission of the Kansas Indians, into the Choctaw and Chickasaw nations, *immediately after the ratification of the treaty*. I do not so understand that article. I think it authorized their admission immediately *after*, but not before, *a determination, by the Choctaw and*

Chickasaw legislatures, to survey and allot the lands. Among the difficulties, encountered by our opponents' theory of this article, are the following:

(1) If the United States had admitted the Kansas Indians, to the Choctaw and Chickasaw nations, immediately after the ratification of the treaty, they would have been bound to remove them when the legislatures of those nations decided not to survey and sell their lands.

(2) If the language of the treaty were this: "Whereas *some time must necessarily elapse before the Choctaw and Chickasaw legislatures can act upon the question of surveying and allotting the Choctaw and Chickasaw lands, during which time* the United States may desire to remove the said Indians from their present abiding places, it is hereby agreed that the said Indians, may at once come into the Choctaw and Chickasaw nations, settling themselves temporarily as citizens of said nations,"—if this were the language of article 31, it might, of course, be claimed that the United States had secured an arrangement for the admission of the Kansas Indians immediately after the ratification of the treaty, the Indians being liable to summary removal, in the event of adverse action by the Choctaw and Chickasaw legislatures.

But the provision of article 31 is very different. It is this: "And whereas *some time must necessarily elapse, before the surveys, maps, and selections,* herein provided for *can be completed,* so as to permit the said Kansas Indians to make their selections, in their order, *during which time* the United States may desire to remove the said Indians, &c." The time, during which the United States might desire to change the location of the Kansas Indians, was, by the terms of the article, made to commence, *not with the ratification of the treaty, but with the commencement of the surveys.* Now the surveys and the completion of the

maps, exhibiting not only the subdivision lines, but also "as far as practicable the outlines of the actual occupancy of members of the said nations, respectively," would necessarily have been the work of many months, if not of several years; and, therefore, it was important, to the United States, to secure the admission of the Kansas Indians immediately after the determination, by the Choctaw and Chickasaw legislatures, of the question on which hinged the question of admitting or excluding those Indians.

My construction of article 31 is confirmed by the fact that the United States never settled any Kansas Indians, or other Indians, in the country of the Choctaws and Chickasaws east of the 98th meridian.

The fifth proposition is not "embodied" in article 37 of the treaty. That article relates only to the terms, on which the Kansas Indians were to be admitted to the country of the Choctaws and Chickasaws, if their legislatures should determine to survey and allot their lands. And the terms prescribed, in article 37, are not the terms prescribed in the fifth proposition. The fifth proposition required the terms to be fixed, either by the parties, with the approval of the government, or by the government itself. Article 37 requires the terms to be fixed, neither by the parties, with the approval of the government, nor by the government, but by the Choctaw and Chickasaw legislatures, within limits precribed in the treaty.

There is another reason why articles 30, 31, and 37 fail to "embody" the fifth proposition. That proposition contained the word "*must*." "A portion of the lands * * *must* be set apart." This language is imperative. It is not satisfied by a conditional stipulation,—a stipulation to take effect, *if* the Choctaw and Chickasaw legislatures shall so decide. It requires an unconditional stipulation,—a stipulation to take effect when the treaty is rati-

fied. But articles 30, 31, 37 contain no such unconditional stipulation. It was left to the legislatures of the Choctaw and Chickasaw nations to say whether the Kansas Indians should be admitted to their country east of the 98th meridian; and their legislatures said "no." The result was that no provision was consummated, in this treaty, for the admission of the Kansas Indians to any part of the Choctaw and Chickasaw territory, except in the third article of the treaty.

But there is still another reason why articles 30, 31, and 37 fail to "embody" the fifth proposition. That proposition requires land to be set apart for "friendly Indians in Kansas or elsewhere," (including of course friendly Indians north of the Indian Territory) whether such Indians are, or are not, civilized. But the provision of articles 30, 31, and 37, conditional as it is, only applies to civilized Indians. Articles 30, 31, and 37 exclude, while the fifth proposition includes, uncivilized friendly Indians north of the Indian Territory.

The result is that article 30, even if it could, as it could not, have become operative, without the antecedent consent of the Choctaw and Chickasaw legislatures to the survey and allotment of the Choctaw and Chickasaw lands, would have wholly failed to "embody" so much of the fifth proposition as related to Indian tribes other than those located north of the Indian Territory. The conditional stipulation, embraced in this article, did not become operative because the Choctaw and Chickasaw legislatures did not consent to the survey and allotment of the Choctaw and Chickasaw lands. If it had become operative, it would only have met the requirements of the fifth proposition as to the northern Indians. But inasmuch as it was a *conditional* stipulation, which was not to take effect unless, or until, the legislatures of the Choctaw and

Chickasaw nations should decide to survey and allot their lands, this article 30 did not practically meet the requirements of the fifth proposition that "land *must* be set apart," *even as to the northern Indians.* It only provided that lands should be set apart for them, *if the Choctaw and Chickasaw legislatures should thereafter so decide.*

The dissenting judge says, on page 82, that, "by articles 30, 31, 37 of the treaty last named, it is provided that the Choctaw and Chickasaw nations will receive, even before a survey of the lands has been made, civilized Indians from the tribes generally known as the Kansas Indians, being to the north of the Indian Territory, not exceeding 10,000 in number, into their respective districts east of the ninety-eighth degree of west longitude, &c.," and that "those provisions are in accord with the fifth proposition." But he overlooks these two facts, among others: (1) that the condition of the admission of those Indians was that the Choctaw and Chickasaw legislatures should first consent to the survey and allotment of their lands; and (2) that those legislatures refused to consent to such survey and allotment.

Inasmuch as article 30 did not set apart any land for the settlement of Indians, but merely left it to the Choctaw and Chickasaw legislatures to determine whether any land east of the 98th meridian should, or should not, be set apart for that purpose, it follows that, unless the cession of article 3 was a cession in trust for the settlement of Indians on the land between the 98th and 100th meridians, there was, in the treaty of 1866, no compliance with the requirement, of the fifth proposition, that land should be set apart, by the treaty, for Indian settlement; and no land was set apart, by the treaty, for that purpose. If the cession of article 3 was not a cession in trust for the settlement of friendly Indians in the leased district, the treaty

of 1866, instead of conveying the land, in fee, to the United States, in trust for the settlement of friendly Indians on the land, actually empowered the United States to extinguish the leasehold title, which had been secured by the treaty of 1855, to Indians settled on the land and left the United States free to appropriate to their own use the proceeds of the 7,713,239 acres of land, between the 98th and 100th meridians, after having shaken off their obligation to compensate the Choctaws, for the 8,000,000 acres ceded to Spain, by the payment of five cents per acre therefor.

One of two things, therefore, must be true. It must be true that the cession of article 3 was a cession, in trust, for the settlement of friendly Indians on the land; or it must be true that, so far as the Choctaws and Chickasaws were concerned, the authorities of the United States used the fifth proposition merely as a pretext, to cover the acquisition of an absolute title to the leased district, exempt from a trust for the settlement of Indians, and open to general settlement. There is no ground for this grave charge against the commissioners who negotiated the treaty, or the senate who advised its ratification, or the president who ratified it.

It appears, then, that no consideration for the cession is *expressed* in the treaty of 1866, and also that the fifth of the Fort Smith propositions is not *expressly* incorporated into any of the provisions of that treaty. But the leased district contains 7,713,239 acres of land. The minimum and maximum prices of pre-empted public lands, fixed by the act of May 20, 1862, 12 Stat. 392, were $1.25 and $2.50, respectively, per acre, which must have been less than their cash value. These lands were then worth $9,647,798 or $19,295,596. According to Senate Report No. 552, 52d Congress, 1st session, pages 10 and 16, the value of these lands, in 1892, exceeded

$40,000,000. The assumption that the Choctaws and Chickasaws would have conveyed, or the United States would have consented to acquire, lands of such value, without any consideration, would of course be unreasonable. It would seem that there must have been some *implied* consideration for the cession.

But if the conveyance was absolute, no consideration can be discovered, unless the price paid for the land was the pardon of the Choctaws and Chickasaws for their participation in the war of the rebellion. This supposition seems to be excluded by the fact that the Cherokees, Creeks and Seminoles also participated in the rebellion, and yet no authority has ever denied that their cessions, made also in 1866, were conditional conveyances. If, on the other hand, the cession of the Choctaws and Chickasaws was a conditional cession, for the settlement of Indians on the land, a consideration for the conveyance is easily found. The condition to settle Indians on the land constituted the consideration.

Possibly an additional element of the consideration is to be found in an implied contingent purpose to locate, in the leased district, such Choctaw and Chickasaw freedmen as should be willing to emigrate from the Choctaw and Chickasaw nations. A careful analysis of the provisions of article 3 of the treaty will, I think, suggest such a possible element of the consideration. For the United States did undertake to remove such of the Choctaw and Chickasaw freedmen as should be willing to emigrate. But if they were to remove them, it would be necessary to locate them somewhere. There was no land accessible, at that time, for that purpose, except the leased district.

I submit, therefore, that the treaty, on its face, strongly suggests that the cession was, not an absolute, but a conditional conveyance.

V.

The subsequent action of the executive department of the government of the United States.

The dissenting judge is of the opinion that the proofs, which I am about to offer as aids in the interpretation of this treaty, are not admissible because interpretations of a law or treaty, by officials charged with its execution, are not competent proofs when the provision to be interpreted has only one possible meaning. But if the word "cede" may be used, in a treaty, in many different senses, as I have attempted to show, there would seem to be no valid objection to the use of these proofs, even if they amounted to nothing more than interpretations of the treaty by officials charged with its execution.

1. The commissioners, who represented the United States at the Fort Smith council, in 1865, were D. N. Cooley, Elijah Sells, Thomas Wistar, W. S. Harney and E. S. Parker. Mr. Cooley was president of the council, and was also, at the time, commissioner of Indian affairs. In his annual report for 1865, he said:

> With the Choctaws and Chickasaws a treaty was agreed upon, based on the seven propositions heretofore stated, in addition to which these tribes agreed to a thorough friendly union among their own people and forgetfulness of past doings and the opening of the leased lands to the settlement of any tribes whom the government of the United States might desire to place thereon. * * * This treaty, after its approval by the councils of the Choctaws and Chickasaws, is to be signed, in this city, by three delegates from each nation, to be sent here for that purpose.

2. The commissioner of Indian affairs, who presided in the negotiation of the treaty of 1866, in his report for 1866, relating to that treaty, said:

> Four principal points came up for settlement, to wit: * Cession of lands by the several tribes, to be used for the settlement thereon of Indians whom it is in contemplation to remove from Kansas. * The first tribe, with which arrangements were consummated, were the Seminoles. *

The Indians cede the government the entire domain secured to them by the treaty of 1856. * The next treaty, in this series, was made with the confederate nations of Choctaws and Chickasaws. * The Indians cede to the government the whole of that tract of land known as the leased lands. * Appendix, 157.

If this language of the commissioner implies that either one of these cessions was a conveyance in trust, it obviously implies that the other was a conveyance in trust. He makes no discrimination between them. And yet, under the treaty of 1866, the United States paid the Seminoles for this cession, as a conveyance in trust, the sum of $325,362; and afterwards, under the act of March 2, 1889, 25 Stat. 1004, paid them, for an absolute cession of the same land, the additional sum of $1,912,942.02.

3. The secretary of the interior in an official communication dated May 1, 1879, said:

* The title acquired by the government, by the treaties of 1866, was secured in pursuance and furtherance of the same purpose of Indian settlement, which was the foundation of the original scheme. That purpose was the removal of Indian tribes from the limits of the political state and territorial organizations, and their present permanent location upon other lands sufficient for the needs of each tribe. These lands being ample in area for the purpose, it has become a settled policy to locate other tribes thereon, as fast as arrangements can be made; and provision has been constantly made, by treaties, agreements and acts of congress, to effect these objects.

That purpose is expressly declared in the said treaties. The cessions of the Creeks and Seminoles are stated to have been made, "in compliance with the desire of the United States to locate other Indians and freedmen thereon." These words must be held to create a trust equivalent to what would have been imposed had the language been, "for the purpose of locating Indians and freedmen thereon."

The lands ceded by the Choctaws and Chickasaws were, by article 9 of the treaty of June 22, 1855, "leased to the United States, * for the permanent settlement of the Wichita and such other tribes, or bands, of Indians, as the government may desire to locate therein." The treaty of 1866 substituted a direct purchase for the lease, but did not extinguish or alter the trust. App. 16.

4. In the president's proclamation of February 12, 1880, relating to the Indian Territory, he says:

Which territory is designated, recognized, and described by the treaties and laws of the United States, and by the executive authorities, as Indian country, and, as such, *is subject only to occupation by Indian tribes*, officers of the Indian department, military posts, and such persons

as may be privileged to reside and trade therein, under the intercourse law of the United States. (App. 168

5. The report of the Indian office, transmitted by the secretary of the interior to the president, February 17, 1882, contains the following statements:

The lands to which the United States holds the legal title, within the Indian Territory, are reserved, by treaty stipulation and acts of congress, and are not, and never have been, public lands subject to general occupation.

The treaties, by which the United States acquired title to any of the lands in the Indian Territory, or obtained the conditional right to control the disposal of any of said lands, were the treaties with the Seminoles of March 21, 1866, with the Choctaws and Chickasaws of April 28, 1866, with the Creeks of June 14, 1866, and with the Cherokees of July 19, 1866.

The lands reconveyed to the United States by the foregoing treaties are, therefore, held subject to the trust named. They can be appropriated only to the uses specified, and to those only by the United States, and then only in the manner provided by law. Miscellaneous immigration, even by the intended beneficiaries, would be unauthorized and illegal.

The Choctaw and Chickasaw cession of April 28, 1866, (14 Stats. 769), was by the tenth section thereof made subject to the conditions of the compact of June 22, 1855 (11 Stats. 613), by the ninth article of which it was stipulated that the lands should be appropriated for the permanent settlement of such tribes, or bands, of Indians as the United States might desire to locate thereon.

The title of the United States to lands in the Indian Territory is, as heretofore shown, subject to specific trusts, and it is not within the lawful power of either the legislative, or executive, departments of the government, to annihilate such trusts, or to avoid the obligation arising thereunder. Such trusts are for the benefit of Indian tribes and Indian freedmen. App. 169

6. A report of the Indian office, dated January 31, 1884, transmitted by the secretary of the interior to the senate, contains the following statement relating to the Indian Territory:

No part of said territory remains free from appropriation either to a direct trust, assumed by treaty, or by reservations for tribes thereon under executive order, except that portion still claimed by the state of Texas, and lying between Red river and the North fork of the same. (App. 17

7. On the 14th of February, 1884, the secretary of the interior, in response to a resolution of inquiry adopted by the senate, said:

These lands were acquired by treaties with the various Indian nations or tribes in that territory in 1866, to be held for Indian purposes, and to some extent for the settlement of the former slaves of some of said nations, or portions thereof. Such are the purposes for which said lands are now being used or held according to the common understanding of the objects of the treaties by which they were acquired, and from these arise the necessity for, or obligation to keep said lands in their present condition of occupancy or otherwise.

8. A proclamation of the president, dated July 1, 1884, relating to the Indian Territory, contains the following statement:

Which territory is designated, recognized, and described by the treaties and laws of the United States and by the executive authorities as Indian country, and as such is subject to Indian occupation only.

9. In an official communication from the secretary of the interior to the president relating to the Indian Territory, dated January 26, 1885, the secretary refers to a former decision, "that no part of said territory remains free from appropriation, either to a direct trust assumed by treaty, or by reservations for tribes thereon under executive order, except that portion still claimed by the state of Texas and lying between Red river and the North fork of the same," and says:

This status of the land, as thus determined, has been adhered to by this department; and on April 26, 1879, February 12, 1880, and in July, 1884, proclamations were issued by the president, warning unauthorized persons against going upon these lands.

Objection will be made to the occupation of any part of the Indian Territory by other than Indians, on the ground that the government set apart the territory for the exclusive use of the Indians and covenanted that no others should reside therein. It is not denied that the treaties so provide. It is, however, within the power of the government, with the consent of the Indians interested, to change this provision of the treaties so that these desirable unoccupied lands may be placed within the lawful reach of the settlers.

10. An official report of the Indian office, dated January 26, 1885, contains the following:

The title acquired by the government, by the treaties of 1866, was secured in pursuance and furtherance of the same purpose of Indian settlement which was the foundation of the original scheme. That purpose was the removal of Indian tribes from the limits of the political state and territorial organizations, and their permanent location upon other lands sufficient for the needs of each tribe.

These lands being ample in area for the purpose, it has become a settled policy to locate other tribes thereon, as fast as arrangements can be made, and provisions have been constantly made, by treaties, agreements, and acts of congress, to effect these objects. App. 171.

The foregoing documents are official acts of the president, secretary of the interior and commissioner of Indian affairs. They are something more than mere interpretations of the treaty. They are adjuncts,—or rather integral parts of the acknowledgment of the trust which was consummated by the act of congress approved March 3, 1891. On page 89, the dissenting judge says: "The claimants are seeking an interpretation of the treaty from external facts which question the good faith and acts of the treaty-making power. That, I contend, the congress have not committed to judicial scrutiny or action." It is difficult to see how a request for such an interpretation of the treaty, as shall carry out the intent of *both parties*, can be justly characterized as an imputation on the good faith of the treaty-making power. In view of the fact that, until the time of Secretary Noble, the president and senate, constituting the treaty-making power, and also the secretaries of the interior and the house of representatives, all, without exception, held this cession to have been intended as a conveyance in trust, this statement of the dissenting judge would seem to be an evident mistake. If there is any imputation of improper action, on the part of the United States, in this transaction, it would seem to come from those who assert that the treaty-making power obtained, from the Choctaws and Chickasaws, for a merely nominal consideration, an absolute conveyance of 7,713,239 acres of land.

VI.

Subsequent action of congress.

In 1889 the demands of the whites, for the lands of the Indians within the Indian Territory, had become as clamorous as they had been seventy years before for their lands east of the Mississippi river. The government was compelled to abandon the policy, which had dedicated the Indian Territory to the exclusive use of the Indians, and to take measures to secure large bodies of land, in that territory, for general settlement, under the laws of the United States applicable to public lands. But the treaties of 1866 were obstacles to the execution of this new policy. The government removed these obstacles, to a considerable extent, by payments to the civilized tribes as follows, viz: to the Creeks, for an absolute conveyance of their land, $2,280,857.19, in addition to the sum of $975,168, which had been paid for the conditional conveyance of 1866; to the Seminoles, for an absolute conveyance of their land, $1,912,942.02, in addition to the sum of $325,362 paid for the conditional cession of 1866; to the Cherokees $1.42 per acre; and to the Choctaws and Chickasaws $2,991,450, for the Cheyenne and Arapahoe reservation.

The 15th section of the act of congress approved March 3, 1891, 26 stat. 1025, contains the following provision:

> And the sum of two million nine hundred and ninety-one thousand four hundred and fifty dollars be and the same is hereby appropriated, out of any money in the treasury not otherwise appropriated, to pay the Choctaw and Chickasaw nations of Indians for all the right, title, interest, and claim, which said nations of Indians may have in and to certain lands now occupied by the Cheyenne and Arapahoe Indians under executive order; said lands lying south of the Canadian river, and now occupied by the Cheyenne and Arapahoe Indians; said lands have been ceded in trust, by article three of the treaty between the United States and the

said Choctaw and Chickasaw nations of Indians, which was concluded April 28, 1866, and proclaimed on the 10th day of August of the same year.

For more than a quarter of a century the government had invariably held the cession of 1866 to be a cession in trust, when President Harrison, on the 18th of February, 1892, sent a message to congress, giving his reasons for delaying the payment of the money appropriated by the act of March 3, 1891, and expressing the opinion that the treaty had invested the United States with the absolute beneficial ownership of the land. This message was referred to the committee on Indian affairs, in each house of congress. The senate committee submitted Senate Report No. 552, 52d Congress, 1st session, and with the report the following resolution:

Resolved, That for reasons set forth in the report of the Committee on Indian Affairs upon the president's message of February 18, 1892, upon the appropriation of March 3, 1891, for payment to the Choctaw and Chickasaw nations for their interest in the Cheyenne and Arapahoe reservation, in the Indian Territory, submitted with this resolution, that it is the opinion of the Senate that there is no sufficient reason for interference in the due execution of the law referred to. Appendix, 239

The debate commenced April 27, 1892; and on the 9th of May the senate came to a vote. An amendment was proposed as follows:

Provided, however, that, in the opinion of the senate, the president should require the leases and the conveyances, which shall be executed by the Choctaw and Chickasaw nations of Indians, mentioned in said appropriation, to contain a full and complete relinquishment of all the right, title, interest, and claim of said nations of Indians in and to all the lands between the 98th and 100th meridians of west longitude, formerly owned by them, and of all claim to reimbursement and compensation for and on account of the same. Appendix, 239.

This amendment was rejected by a vote of yeas 13, nays 41. The resolution was then adopted by a vote of yeas 43, nays 13. Cong. Rec. 52d Cong. 1st sess., p. 4093. The house of representatives by a vote of yeas 163, nays 47, adopted a resolution in the identical words of the senate resolution.

On the 17th of December, 1892, the house of representatives adopted the following resolution:

Resolved by the senate and house of representatives, that the secretary of the treasury be, and he is hereby, directed to retain and cover back into the treasury $48,800 of the appropriation made by congress, to pay the Choctaw and Chickasaw tribes of Indians for their interest in land of the Cheyenne and Arapahoe reservation, dated March 3, 1891, which amount has been ascertained, by a recount of the allottees of the said Cheyennes and Arapahoes, to be, by that amount, more than is due the said Choctaws and Chickasaws, upon the purchase and settlement for their said interest. Cfhb. 46.

The senate adopted the following amendment to this resolution, in which amendment the house concurred:

Provided, however, that neither the passage of the original act of appropriation to pay the Choctaw and Chickasaw tribes of Indians, for their interest in the lands of the Cheyenne and Arapahoe reservation, dated March 3d, 1891, nor of this resolution shall be held, in any way, to commit the government to the payment of any further sums to the Choctaw and Chickasaw Indians, for any alleged interest in the remainder of the lands situate in what is commonly known and called the leased district. Cfhb. 47.

The reasons assigned by the president, for his refusal to execute the law, were met by the committee as follows:

In the message of the president, transmitted to congress February 17, 1892, he says:

"After a somewhat careful examination of the question I do not believe that the lands for which this money is to be paid were, to quote the language of section 15 of the Indian appropriation bill already set out, 'ceded in trust by article 3 of treaty between the United States and said Choctaw and Chickasaw nations of Indians, which was concluded April 28, 1866.'"

The president is of the opinion that the lands in question were not ceded in trust to the United States by this treaty. He thinks that an absolute, unqualified title was conveyed by the treaty, and as he elsewhere says, that the United States paid the Choctaws and Chickasaws therefor the sum of $300,000. On the contrary, your committee believe that the estate conveyed was a trust estate only; that whereas the treaty of 1855 empowered the United States to locate upon these lands only those Indians whose ranges were included within certain specified limits, this treaty of 1866 authorized the United States—

(1) To locate upon these lands Indians like the Cheyennes and Arapahoes, whose ranges were not within the limits designated in the treaty of 1855, and whom, prior to the treaty of 1866, the United States had no right to locate upon the lands;

(2) To locate upon the lands Choctaw and Chickasaw freedmen;

(3) Deprived the Choctaws and Chickasaws themselves of the right to settle thereon.

The treaty disposed of this sum of $300,000 as follows:

It was to remain in the treasury of the United States. If the Choctaws and Chickasaws should decide not to confer citizenship upon their freedmen, and the United States should remove the freedmen with their consent from the Choctaw and Chickasaw nations, then the sum of $300,000 was to be held in trust for the freedmen. If the Choctaws and Chickasaws should decide not to admit their freedmen to citizenship, and the freedmen should decline to be removed from the Choctaw and Chickasaw nations, then this sum of $300,000 was to remain the property of the United States. But if within two years the freedmen should be invested with citizenship, and should refuse to leave the Choctaw and Chickasaw nations, then, and only then, was the money to be paid to the Choctaws and Chickasaws.

The purpose of this provision relating to the $300,000 was not to pay for the land. Its object was to cover the cost of the removal of the freedmen if the Choctaws and Chickasaws should not admit them to citizenship, or to compensate the Choctaws and Chickasaws in some measure for the benefits conferred upon the freedmen by conferring citizenship upon them, in case this should be done. These benefits were material and substantial; in addition to all the civil and political rights enjoyed by the Indians themselves, they acquired property rights such as were conferred upon no freedmen outside of the Indian Territory. They have the free use of lands just as the Indians have, and the benefit of excellent schools, for the support of which they have never contributed in any way a single cent. To have these rights conferred upon 3,000 freedmen the government agreed to pay $300,000. The Choctaws agreed to it, the Chickasaws did not. This sum was fixed at $300,000 because the number of freedmen were estimated at 3,000, and it was agreed that each freedman, in case of removal, should receive for the expenses incident to emigration the sum of $100.

The Choctaws admitted their freedmen to citizenship and received their share of the sum of $300,000, less $7,200 paid to freedmen who promised to emigrate from the Choctaw nation. 1 Kappler, 208.

The committee proceed to set forth, at length, on pages 11, 12, 13, and 14 of the report, the grounds on which they base the conclusion that the estate conveyed by the treaty was a trust estate only. Their statement merits careful consideration.

The committee then reply to another statement of the president:

But the president, referring to the leased district, says:

"As to these lands, the government had already, under the treaty of 1855, secured the right to use them perpetually for the settlement of friendly Indians. This was not true as to the other tribes referred to."

This statement, if material to the question now at issue, means, first, that by the treaty of 1855 the government acquired the right to locate upon these lands *any* Indian tribes which it might be convenient for the government to locate thereon, without restriction or limitation; and, secondly, that the government, by the treaty of 1855, acquired the right to allot these lands in severalty to such Indians. On both of these points, your committee think, the president is mistaken.

The treaty of 1855 secured to the government the right to locate on the lands in controversy those Indian tribes whose homes and ranges were within certain designated limits, and no others. The following is the text of the treaty:

"The Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude, for the permanent settlement of such other tribes or bands of Indians as the government may desire to locate therein; excluding, however, all the Indians of New Mexico, and also all those whose usual ranges at present are north of the Arkansas river, and whose permanent locations are north of the Canadian river, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas."

Moreover, the treaty of 1855 did not grant, or purport to grant, to the United States any right to allot these lands in severalty to individual owners, or to transfer the ownership of the lands. As to these lands the treaty of 1855 was not a deed in fee simple, but only a lease from the Choctaws and Chickasaws to the United States. It empowered the United States, not to convey, but only to sublet the lands. The words of the treaty are:

"The Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude."

Until the Choctaws and Chickasaws assented to the provisions of the act of March 3, 1891, they were never willing nor did they ever consent that these lands should be opened to settlement by whites, or allotted, or conveyed in severalty, to whites, blacks, or Indians. (App. 218.

In answer to a third reason assigned by the president, for his refusal to execute the law, the committee say:

The president expresses the opinion that the conditions attached to the cessions in the Creek and Seminole treaties of 1866 were the same as those which were attached to the lease in the Choctaw and Chickasaw treaty of 1855, and that, therefore, the claim of the Choctaws and Chickasaws that the cession in their latter treaty of 1866 was encumbered by a condition, or trust, is not supported by any analogies of the Creek and Seminole cases. This is a mistake. The trusts created in the Creek and Seminole treaties of 1866 were trusts (1) for the location of friendly indians, in general, without restriction, and (2) for the location of freedmen. Neither of these two trusts were created by the Choctaw and Chickasaw treaty of 1855. Neither of them existed, in the case of the leased district, until created by the Choctaw and Chickasaw treaty of 1866. The trust created by the Choctaw and Chickasaw treaty of 1855 was a trust not to locate Indians in general, but to locate certain Indians whose ranges were included within the boundaries designated in the treaty. This treaty of 1855 contained no trust whatever for the location of freedmen. That trust was first created, for the leased district, by the Choctaw and Chickasaw treaty of 1866.

It is true that these two trusts of the Choctaw and Chickasaw treaty of 1866 are not created by express words qualifying the grant. But this is also true of the Creek and Seminole treaties. In those treaties the trusts are not expressed, but are implied in words used in recitals only. They are not implied in either of those treaties, in words used in the

body of the grant. The recital in each case is in the following words: "In compliance with the desire of the United States to locate other Indians and freedmen thereon," etc. The words of the grant are even stronger in the Creek and Seminole treaties than in the Choctaw and Chickasaw treaty. The Choctaws and Chickasaws "cede," but the Creeks and Seminoles "cede and convey."

These trusts in the Choctaw and Chickasaw treaty of 1866 are implied in the language of the third article, in which the words of conveyance, the statement of the consideration, and the arrangements for the freedmen are placed in such juxtaposition as not only to warrant, but to necessitate, the inference that it was the object of the parties, and the effect of the treaties, to authorize the United States to locate upon these lands Indians whose ranges were not embraced within the limits designated in the treaty of 1855, and also to locate Choctaw and Chickasaw freedmen thereon, and that the cession was encumbered by corresponding trusts.

If this be not true, if the Choctaw and Chickasaw deed of 1866 was an absolute deed, while those of the Creeks and Seminoles were only deeds in trust, then gross injustice was practiced upon the Choctaws and Chickasaws by the United States in 1866, for the Creeks then received $325,362 for a deed in trust of only 2,169,080 acres of land, and the Seminoles received $975,168 for a deed in trust of only 3,250,560 acres; but for 7,713,239 acres of land, which had been previously held by the United States under a gratuitous lease for eleven years, the Choctaws and Chickasaws received not a single penny, unless the $300,000 provided for the freedmen be erroneously reckoned as compensation to the Choctaws and Chickasaws for the grant. And now the president having, in 1889, paid the Creeks for the same lands the additional sum of $2,280,857, and having, in the same year, paid the Seminoles for the same lands an additional sum of $1,912,942 02, has, for almost twelve months, refused to pay the Choctaws and Chickasaws the amount appropriated by the act of March 3, 1891.

The committee further answer the president as follows:

The treaty between the United States and Spain, by which the United States ceded these lands to Spain, in part payment for Florida, which was ratified February 19, 1821, is designated by the president as the treaty of 1819. And he designates the treaty by which the United States had previously ceded the same lands to the Choctaws as the treaty of 1820. He says:

"The boundary between the Louisiana purchase and the Spanish possession, by our treaty of 1819 with Spain, was, as to these lands, fixed upon the one hundredth degree of west longitude. Our treaty with the Choctaws and Chickasaws, made in 1820, extended their grant to the limit of our possessions. It followed, of course, that these lands were included within the bounds of the state of Texas, when that state was admitted to the union, and the release of the Choctaws and Chickasaws, whatever it was worth, operated for the benefit of the state of Texas, and not of the United States."

These statements are altogether erroneous. They mean that the lands in question had been sold to Spain before the Choctaw treaty of 1820 was made, and so were not ceded to the Choctaws by the treaty of 1820, and, therefore, the release of 1855 operated for the benefit of Texas, whose title was derived from Spain, and not for the benefit of the United States. But the facts are as follows:

The district west of the one hundredth meridian, as already shown, belonged to France, as a part of the province of Louisiana, from 1685 to 1762. In 1762 it was ceded by France to Spain. In 1800 it was retroceded by Spain to France. In 1803 it was ceded by France to the United States. In 1820 it was ceded by the United States to the Choctaws in part payment for their lands east of the Mississippi river. In 1821, while this district was the property of the Choctaws, the United States, without their consent or knowledge, ceded it to Spain in part payment for Florida. It afterwards became successively the property of Mexico and Texas. (American State Papers, vol. 2, pp. 574, 575, 630, 634, 637, 663, 664; vol. 4, pp. 471, 473, 478, 479; Henry Clay's speech, house of representatives, April 3, 1820; sixteen European maps, eighteenth century.)

The Spanish treaty was negotiated in 1819; but it was most vehemently opposed in the congress of the United States *and was rejected by the king of Spain.* While this rejected treaty was dead the United States, in 1820, conveyed the same land to the Choctaws, without disclosing to the Choctaws the facts connected with the defunct Spanish treaty. After the treaty had been dead and buried nearly two years, it experienced a resurrection and a ratification in 1821.

The government then found itself in this embarrassing predicament: The Choctaws, by the treaty of 1820, had conveyed to the United States all their lands in the State of Mississippi, and in payment therefor the United States had conveyed to the Choctaws all the lands included within certain defined boundaries west of the Mississippi river. The deed to the Choctaws embraced the district west of the one hundredth meridian, but afterwards, in 1821, the United States, without the consent or knowledge of the Choctaws, conveyed the same lands to Spain in part payment for Florida. It then became obligatory upon the United States, as already indicated, to take one of four courses, either to reconvey to the Choctaws a part of their lands in the state of Mississippi, or to convey to the Choctaws additional lands west of the Mississippi river, or to surrender the treaty of 1820 altogether and restore to the Choctaws all their lands in the state of Mississippi, and receive back the lands ceded to them west of the Mississippi river, or, finally, to compensate the Choctaws in money for those lands west of the one hundredth meridian which had been sold to, and paid for, by them, and subsequently, without their consent, conveyed to Spain. The United States chose the latter course, and by the treaty of 1855, for the sum of $800,000, secured from the Choctaws a quitclaim of their title to these lands and a lease of the lands between the ninety-eighth and one hundredth meridians of west longitude.

The president thinks that when the Choctaws and Chickasaws, for the sum of $800,000, relinquished their right of reclamation against the United States for the alienation of their lands, by a release or quitclaim of their interest in those lands, this release "operated for the benefit, not of the United States, but of the owner deriving title from Spain." But the Chickasaws assert, with good reason, as your committee think, that when they furnished the United States 6,589,440 acres of land, which was actually applied by the United States in part payment for Florida, the transaction inured to the benefit of the United States. They think that when an individual furnishes a debtor means to pay his debts, the transaction inures to the benefit of the debtor. But then it is not true that 'our treaty with the Choctaws and Chickasaws, made in 1820, extended their grant to the limit of our possessions." There was no such pro-

vision in the treaty of 1820. It occurred, for the first time, in the treaty of 1830, made ten years after the land had been sold to the Choctaws; and, while it did deprive the Choctaws of that part of their land which was sold to Spain in 1821, it did not curtail the area actually ceded by the United States to the Choctaws in 1820, nor did it impair their right of reclamation against the United States. Ala. 222.

The president, in his message of February 17, 1892, expressed the opinion that a considerable part of this sum of $800,000, was probably intended as rent for the leased district. He said:

It seems probable that a very considerable part of this consideration must have related to the leased lands, because these were the lands in which the Indian title was recognized and the treaty gave to the United States a permanent right of occupation by friendly Indians. Ala. 224.

To this suggestion of the president the senate committee replied as follows:

One of the grounds assigned for the president's opinion is that the Indian title to the leased lands "was recognized" by the United States. This implies that the Indian title to the lands west of the one hundredth meridian was not recognized by the United States. But your committee think that this fact, if it were a fact, would have no bearing whatever upon the question of the apportionment of the consideration of $800,000 as between the conveyance and the lease. The Indians themselves recognized the fact that the legal title conveyed to them in 1820 had been extinguished by the conveyance to Spain in 1821. They knew that the United States, a sovereign power, invested with the right of eminent domain, had ceded their lands, by a valid treaty, to the king of Spain. But they believed that the ratification of the Spanish treaty in 1821 had not extinguished their right of reclamation against the United States for this transfer of their lands without their consent to a foreign power.

Your committee, therefore, believe that the entire sum of $800,000, paid in pursuance of the treaty of 1855, was but a small part of the value of the 6,589,440 acres of land west of the one hundredth meridian, and that the whole of that sum was fairly applicable to the quitclaim or release of that land west of the one hundredth meridian. Ala. 224

Further answering the president the committee say:

The president thinks that if an Indian nation, being the owner of a tract of land purchased from the United States and fully paid for, cedes the land back to the United States, by a conveyance in trust, the terms of the trust permitting the location of other Indians and of freedmen upon the land, but interdicting the location of white men thereon, the United States can evade the interdict, by locating other Indians upon the land and purchasing from them a release from the interdict, and can then open the land to settlement by white citizens. He thinks that, upon the assumption that the Choctaws and Chickasaws, in their lease of 1855 and in their cession of 1866, interdicted the location of whites upon the leased district, it was nevertheless competent for the United States

to cede the land to the Cheyennes and Arapahoes and then purcha
from the Cheyennes and Arapahoes their interest in the land, with t
right to open it to "white settlement," and that, by this device, t
United States could evade the interdict of the Choctaws and Chickasaw
He thinks that if the United States, after paying the Cheyennes a
Arapahoes for their interest in the lands, should be required to pay t
Choctaws and Chickasaws for exemption from the restrictions impos
by their conveyance, then the United States would, in effect, be r
quired to pay twice for the privilege of opening the land to "white se
tlement," or, as he expresses it, would be compelled to pay twice for t
same land.

On this point your committee are constrained to differ in opinion wi
the president. It certainly was competent for the United States
locate Cheyennes and Arapahoes upon these lands and afterward to pa
them whatever the United States saw fit to pay for a quitclaim of the
interest in the land and for their consent to the location of whit
thereon. But whatever effect such an arrangement might have as b
tween the United States and the Cheyennes and Arapahoes, it cou
have no effect whatever to release the United States from the restri
tions imposed in the treaties of the Choctaws and Chickasaws. In t
same way an individual holding land in trust might, by purchasing fro
his own grantee a release from the obligation of the trust imposed b
his grantor, divest his title of the trust and invest himself with an abs
lute title, and then resist his grantor's demand for redress by setting u
his grantee's release and his own payment to his grantee for such releas
If the United States saw fit not only to give the Cheyennes and Arap
hoes allotments in severalty of a part of the land, but also to pay the
money for their quitclaim of the residue and for their consent to i
occupation by white settlers, and attempted by that arrangement
evade the terms of the Choctaw and Chickasaw lease of 1855 and ce
sion of 1866, the United States ought to bear the expense of this spec
lation themselves and cannot rightfully recoup that expense from th
Choctaws and Chickasaws.

Your committee, therefore, conclude that the United States are n
the absolute owners of the leased district, but only hold a trust esta
therein; and they submit the following recapitulation of the grounds
which this conclusion is based:

(1) Under the treaty of 1855 the sum of $800,000 was paid for t
release of the land west of the one hundredth meridian and the lease
the land between the ninety-eighth and one hundredth meridians.

(2) Much the larger part of that payment was applicable to the relea
of the land west of the one hundredth meridian, and a small part, if an
of it to the lease of the land between the ninety-eighth and one hu
dredth meridians.

(3) In 1865 the commissioners, appointed by the president, official
notified the five civilized tribes at Fort Smith, that the lands to be treat
for were to be acquired for the use, not of white men, but of Indians.

(4) The Choctaws and Chickasaws, as well as the other civilized trib
formally accepted that basis of the proposed negotiations, and upon th
basis consented to treat, and did treat, in 1865.

(5) When the commissioners of the Choctaws and Chickasaws met
commissioners of the United States to negotiate the treaty of 1866, th
is no pretense that anything had been paid by the United States towa
the purchase of the land between the ninety-eighth and one hundre

meridians, although the United States had held that land under lease for eleven years.

(6) The treaty of 1866 provided no compensation for the transfer of the absolute ownership of the leased district. The sum of $300,000, named in the third section of that treaty, was to be paid to the freedmen, if they should be removed, but was to remain the property of the United States if citizenship should not be conferred upon the freedmen, and was only to be paid to the Choctaws and Chickasaws in the event that citizenship should be conferred upon the freedmen and they should refuse to emigrate.

(7) The sum of $300,000, named in the treaty of 1866, was not to compensate the Choctaws and Chickasaws for anything except for conferring citizenship and a right to forty acres of land each, upon the freedmen. If citizenship should not be conferred upon the freedmen, the United States, by the terms of the treaty, were to acquire whatever new interest the treaty conveyed in the land, without paying the Choctaws and Chickasaws a dollar for such conveyance.

(8) The effect of the treaty of 1866 was to authorize the government of the United States, whenever it should remove the freedmen, to locate them in the leased district.

(9) It was also the effect of the treaty of 1866 to open the leased district to settlement by friendly Indians *in general*; for the treaty of 1866 omitted the inhibition of the lease of 1855, which excluded from that district all Indians, except those residing or ranging within certain specified limits.

(10) The Creeks and Seminoles entered into treaties with the United States in 1866 upon the basis which had been proposed to and accepted by the five civilized tribes in 1865, and which excluded white settlers from the lands to be ceded to the United States.

(11) The United States, in 1866, paid the Creeks 30 cents per acre for 3,250,560 acres, and also paid the Seminoles $325,362 for 2,169,080 acres, but paid the Choctaws and Chickasaws nothing for 7,713,239 acres ceded, unless the sum of $300,000 provided as compensation for the possible grant of citizenship to the freedmen is to be regarded as payment for the land.

(12) In 1889 the United States paid the Creeks $2,280,857.10 for a release of their interest in the lands ceded by them in 1866, and also paid the Seminoles $1,912,942.02 for a release of their interest in the lands ceded by them in 1866.

(13) To assume that the cession of 1866 was intended, by the parties to the treaty, as an absolute conveyance, is to assume that the Choctaws and Chickasaws intended to convey, and the United States intended to acquire, without any compensation whatever, 7,713,239 acres of land, worth more than $10,000,000 in 1886 and worth more than $40,000,000 at the present time.

(14) As the supreme court has often held, treaties between the United States and the Indian tribes are not without necessity to be so construed as to work injustice upon the "wards of the nation;" but a construction of the treaty of 1866 which makes that treaty the conveyance of an absolute title to the United States will inflict a grievous and unnecessary wrong upon the Choctaw and Chickasaw nations.

(15) The propositions submitted to the civilized tribes by the United States in 1865 as the basis of the negotiation of the treaties of 1866, the provisions of the treaty of 1866, the facts and circumstances attending

the making of that treaty, and the contemporaneous dealings of the United States with the Creeks and Seminoles necessitate the conclusion that the cession made in the Choctaw and Chickasaw treaty of 1866 was intended as a conveyance, not of an absolute title, but only of a trust estate. App. 226.

The counsel for the appellants denied that the act of March 3, 1891, making compensation for the Cheyenne and Arapahoe reservation, furnished a binding legislative construction of the treaty of 1866. They based this denial upon three grounds:

1. That the act of March 3, 1891, was predicated upon a misconception of the facts;

2. That the act, conferring jurisdiction of the pending case, declared that the claim of the Choctaw and Chickasaw nations, to compensation for the Wichita reservation, was "controverted by the United States;"

3. That this jurisdictional act provided "that nothing, in this act, shall be accepted, or construed, as a confession that the United States admit that the Choctaw and Chickasaw nations have any claim to, or interest in, said lands."

The statement that this claim was controverted by the United States did not imply that any official controverted it on any ground involving the question whether the cession of 1866 was absolute, or in trust; or on any ground other than the ground that subsequent possessory rights of the Wichitas impaired the title of the Choctaws and Chickasaws. Nor did it imply that congress controverted the claim on any ground whatever. This jurisdictional act did not declare that *anything therein should be construed to controvert* the claim of the Choctaws and Chickasaws, but left the act of March 3, 1891, standing exactly as it was left by the congress that passed it. It neither admitted, nor denied, the interest of the Choctaws and Chickasaws.

The legislative construction of the treaty of 1866, by the act of March 3, 1891, has precisely the same validity and force, to-day, which it had on the day of the passage of that act. The lands referred to, in section 15 of the act, were, like the lands involved in the pending controversy, a part of the leased district, ceded to the United States, in trust, by the treaty of 1866. If the Cheyenne and Arapahoe reservation was ceded in trust, the entire leased district was ceded in trust. That section placed upon the treaty of 1866 a construction, which is binding in this case, as follows:

> Said lands have been *ceded, in trust*, by article three of the treaty between the United States and the said Choctaw and Chickasaw nations of Indians, which was concluded April 28, 1866, and proclaimed on the tenth day of August, of the same year. 14 Stat. 769.

This exposition of the treaty is binding upon all courts, and in all cases except those in which rights became vested, *under the treaty, prior to the enactment of the statute.* In Postmaster General *v.* Early, 12 Wheat. 136, 148, the question related to the validity and effect of a legislative construction of existing law. The latter statute contained these words:

> The district court shall have cognizance, concurrent with * * the circuit courts of the United States, of all suits, &c.

The particular question was whether this clause placed the law in such a condition as to secure, to the *circuit* courts, the jurisdiction mentioned in the statute. Chief Justice Marshall, delivering the opinion of the court, said:

> It is true that the language of the section indicates the opinion that jurisdiction existed in the circuit courts, rather than an intention to give it; and a mistaken opinion of the legislature, concerning the law, does not make law. But if this mistake is manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act in future. This law expresses the sense of the legislature on the existing law, as plainly as a declaratory act, and expresses it in terms capable of conferring the jurisdiction.

In United States *v.* Freeman, 3 How. 556, 564, the court said:

> If it can be gathered, from a subsequent statute, *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.

In Stebbins *v.* Board of Commissioners, 2 McCrary 196, Mr. Justice Miller, of the supreme court, delivering the opinion of the circuit court for the district of Colorado, said:

> But, by a subsequent act, in 1872, congress, as the defendant alleges, undertook to construe that act, and, in their construction of it, they declare that it should be held to extend to the right to organize railroad companies. It is denied that congress has any right to give a construction to the statute, which will bind the court, and, therefore, it is said that the act of 1867 remains, and this railroad has no competent organization, which will enable it to take subscriptions to stock. But, in a case which came up, concerning taxation, under the internal revenue law, in the supreme court, a very similar statute, construing a former statute, is made the subject of consideration; and, in that case, the court held that, while it might not be true that rights, existing prior to the explanatory or declaratory statute, will be affected by that declaratory statute, yet, inasmuch as congress, or any legislative body, has a right to pass a law, for the future, that such a statute shall be held to mean so and so, while it may not affect past transactions, it is equivalent to the passage of a statute of that character for the future; and, while it is not necessary for us to decide, here, whether that declaratory statute would affect any contracts or transactions prior to its passage, it became a part of the law of 1867.

An act of congress, approved July 17, 1862, provides that the act approved August 6, 1861, "shall not be so construed, after the passage of this act, as to increase the emoluments of the commissioned officers of the army." This reversed the construction theretofore observed, in the war department. In United States *v.* Gilmore, 8 Wall. 330, the supreme court held that the act of 1862, not only fixed the construction of the provision in question, in the act of 1861, but also fixed the construction of a similar provision in a subsequent act, passed in 1864.

A statute of Indiana, enacted in 1825, conferred upon the probate courts authority to "hear and determine all

matters, in relation to the settlement of decedents' estates." In Dequinder et al. *v.* Williams, 31 Ind. 444, the question was whether this provision empowered the probate court to *appoint guardians*. Several subsequent acts had been passed, recognizing, by implication, the validity of such appointments. The court held that those later acts fixed the construction of the act of 1825. The court said:

> If a legislative construction be even plainly contrary to the terms of the act construed, it must, nevertheless, be taken as a new enactment, changing the old law.

Mr. Fox's libel act declared that, by the law of England, juries were judges of the law, in prosecutions for libel; it did not purport to introduce a new rule, but purported to declare a rule already and always in force. Yet before the passage of this act, the courts had repeatedly held that the jury, in these cases, were only to pass upon the fact of publication, and the truth of the innuendos; and that the question whether the publication was libellous, or not, was a question of law, which addressed itself exclusively to the court. It would appear, therefore, that the legislature declared the law to be what the courts had declared it was not. Cooley Const. Lim., 6 Ed., p. 111; Rex *v.* St. Asaph, 3 T. R. 428; Rex. *v.* Withers, 3 T. R. 428.

In State *v.* Trustees, &c., 37 Ohio St. 275, it was held that:

> A statute, declaratory of a former one, has the same effect upon such former act, in the absence of intervening rights, as if the declaratory act had been embodied in the original act, at the time of its passage.

In R.R. Co. *v.* Martin, 7 D. C. 120, 132, the court said:

> Now, although it is not within the competency of even the legislative power to deprive any person of a vested right, by means of a declaratory act, yet, where no right has been already secured, under the former act, the legislature may declare its meaning by a subsequent law, and this will be held to be the meaning of the first law, from the beginning, for no wrong is thereby inflicted, since no rights had become vested.

This declaratory act of 1891 is not only conclusive as a *legislative construction* of the treaty of 1866, but also con-

clusive as an express *acknowledgment of a trust by the trustee.* Let us assume that the statute of frauds is applicable to the case. The statute will be satisfied if the trust can be manifested, or proved, *by any subsequent acknowledgment by the trustee, as by an express declaration, or any memorandum to that effect,* or by a letter under his hand, or by his answer in chancery, or by his affidavit, or by a recital in a bond, or deed, or by a pamphlet written by the trustee, or by an entry in a bank deposit book.

The trust, upon which the leased district was ceded to the United States, is expressly acknowledged by the trustee, in the act of 1891. The acknowledgment is made by those departments of the government, which are invested with the exclusive power to make such acknowledgment. It takes the form of an act of congress, approved by the president of the United States. It is impossible to conceive of a stronger case of the proof of a trust, by the acknowledgment of the trustee. This acknowledgment was not revocable by any subsequent inconsistent action of congress. It permanently fastened upon the United States the character of trustee.

The jurisdictional act of March 2, 1895, contains the following words :

> That, as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, which claim is controverted by the United States, jurisdiction be, and is hereby, conferred upon the court of claims to hear and determine the said claim of the Choctaws and Chickasaws, &c. 28 St. 2.

The counsel for the appellants insisted that the meaning of the statement above quoted was that *congress* controverted the claim of the Choctaws and Chickasaws. But this theory is excluded by the last sentence of the same paragraph. Connecting this last sentence with the clause quoted above, we have the following legislative declaration :

That as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, which claim is controverted by the United States, jurisdiction be, and is hereby, conferred upon the court of claims to hear and determine the said claim of the Choctaws and Chickasaws: * *And provided further*, That nothing in this act shall be accepted or construed as a confession that the United States admit that the Choctaw and Chickasaw nations have any claim to or interest in said lands, or any part thereof.

Now the head of the department of justice controverts the claims prosecuted in the court of claims. In "common parlance," the United States controverts those claims. But this does not mean that congress controverts them. In the case at bar, a former secretary of the interior controverted the Choctaw and Chickasaw claim. Adopting "common parlance," congress said that the United States controverted their claim.

If we understand the meaning of the act to be that the head of the interior department controverted this claim, and that the act itself was not to be construed as an admission, *by congress*, of the validity of the claim, the provision is intelligible and sensible. The counsel for the appellants understand the provision to be, in effect, this: "Congress denies the validity of the claim, provided this denial of its validity shall not be construed as an admission of its validity." But I submit that the proviso conclusively shows that the words, "which claim is controverted by the United States," were not intended as a declaration that *congress* controverted the claim of the Choctaws and Chickasaws.

The counsel for the appellants contended that the Choctaw law of November 20, 1867, is evidence that the Choctaw legislature of 1867 understood the cession of 1866 to be, not a cession in trust, but an absolute cession. On the contrary, if it proves anything, it proves that the legislature of that year understood the cession to be, not an absolute cession, but a cession in trust,—in trust, not

for the settlement of negroes generally, but for the settlement of Choctaw and Chickasaw freedmen. That trust would be as fatal to the claim of an absolute cession, as would be a trust for the settlement of Indians.

It has been asserted that "no serious demand was ever set up, by the Choctaws and Chickasaws to an interest" in the leased district, until 1890. It will be difficult to suggest any occasion for making this claim before 1890. So long as the United States, in performance of the condition on which they held the leased district, devoted it to the settlement of friendly Indians, the Choctaws and Chickasaws had no right to claim any compensation for lands in that district. But when, in 1890, the pendency of the Cheyenne and Arapahoe treaty, which was ratified, by act of Congress, March 3, 1891, disclosed the purpose of the government to shake off the condition, and devote the lands to general settlement, the Choctaws and Chickasaws promptly notified the United States that, upon the consummation of that purpose, they should expect compensation for the lands.

VII.

The injustice and absurdities involved in the cession, if it was an absolute conveyance.

It being assumed that the rent, stipulated for the lease of 1855, was $400,000, if the price, stipulated for the cession of 1866, was $300,000, the entire consideration for the leased district, promised by the United States, was $700,000; if the sum of $300,000 was not the consideration for the cession of 1866, the entire consideration, paid by the United States for the leased district, was only $400,000. If, then, as the result of the pressure applied to the Choctaws and Chickasaws, in the Fort Smith

ouncil, the United States acquired the leased district, om their dependents,—their wards, for $700,000 or for 400,000, it would seem to be impossible for a court of quity to hold that these wards of the nation are, in good onscience, entitled to no further compensation for their nd. Such a transaction would be not only gross in-ustice, in itself, but also an indefensible discrimination favor of the Cherokees, Creeks and Seminoles, and gainst the Choctaws and Chickasaws.

Suppose it were true that the sum of $300,000, men-oned in the first clause of article 3 of the treaty of 1866, stead of being what, in fact, it was, the consideration fered for the grant of citizenship and 40 acres of land each of the Choctaw and Chickasaw freedmen, had en the consideration for the cession of 7,713,239 acres land; and suppose, also, that the sum of $800,000, ntioned in the treaty of 1855, instead of being the nsideration for the quit claim *and* the lease, had been plicable wholly, as rent, to the lease. The interest on s latter sum would amount to little more than a half t per acre. The total amount paid for the leased dis-t, in 1866, would then be $1,100,000. But at the gov-ment price, fixed by the act of May 20, 1862, this d would be worth, either $9,647,798, or $19,295,596. cording to the report of the senate committee its actual ue, in 1892, exceeded $40,000,000.

Whether the price, which the guardian paid the ward this land, was $300,000, or $400,000, or $700,000, or 00,000, the bargain was too unconscionable to be up-l by a court of equity.

ut the taking of the Wichita reservation, by the ted States, for general settlement, without compensa to the Choctaws and Chickasaws, would be an act of st discrimination against the Choctaw and Chickasaw

nations. As compensation for lands acquired, like the leased district, first for the settlement of friendly Indians, and afterwards for general settlement, the United States paid the Creeks $1.25, the Cherokees $1.42 and the Seminoles $1.25 per acre. Recognizing not only the essential justice of the Choctaw and Chickasaw title, but also the obligation of the government to do equal justice to these Indian tribes, the United States paid the Choctaws and Chickasaws $1.25, per acre, for the surplus lands of the Cheyenne and Arapahoe reservation. The obligation of the United States to compensate the claimants, for the surplus lands in the Wichita reservation, based on the intrinsic merits of their case, is strengthened by their obvious duty to deal with them as with the other tribes.

Second.

THE APPROPRIATION OF LAND EMBRACED IN THE CESSION OF 1866 TO GENERAL SETTLEMENT, UNDER THE LAWS OF THE UNITED STATES RELATING TO THE PUBLIC LANDS, IS A BREACH OF THE CONDITION OF THE CONVEYANCE.

The counsel for the government contended that if the cession of 1866 were a conditional conveyance, the condition would be duly performed, so far as the Wichita reservation is concerned, if each man, woman and child of the Wichita and affiliated bands of Indians should obtain an allotment of 160 acres of land, and the surplus lands should be opened to general settlement, provided the proceeds of the sales of such surplus lands should be paid to those Indians. He was of the opinion that a condition for the settlement of Indians, in the leased district, could be duly performed, by the settlement of Indians, on a small tract, and the settlement of whites on

a large tract therein, provided the Indians, settled on the small tract, should receive the money paid by the whites for the larger tract. I think that a condition, for the settlement of Indians, in the leased district, cannot be duly performed, by the settlement of Indians, on parts of the district, and of whites on other parts, whatever is done with the proceeds of the sales of the tracts, on which the whites are settled.

The Wichita agreement, of 1891, allots to each man, woman, and child of the Wichita and affiliated tribes, or bands, a farm of 160 acres, *selected out of a body of* 743,-610 *acres*, and this farm is made alienable, after the expiration of the time limited in the agreement. This arrangement can only be justified, on the assumed grounds, (1) that a farm of 160 acres, so selected, is not an unreasonably large farm, for the settlement of each of these men, women, and children; and (2) that the terms of the trust, under which the United States holds the lands, admit of the investment of the settlers with an alienable title thereto.

It would be fortunate for our country, if there were, within the limits of the United States, land, of half-decent quality, sufficient to make, for each one of our 70,000,000 people, a farm of 160 acres. Nevertheless, I will assume, for the purposes of the argument, that a settlement, on a selected farm, of 160 acres, is not an unreasonable settlement, even for a Wichita infant. I will also assume that the alienability of the land is admissible, under the treaty of 1866. Upon these assumptions, we now have the Wichitas and affiliated bands permanently and lawfully settled, on separate farms of 160 acres. Is not the power, conferred upon the United States, by the treaty of 1866, exhausted, by this settlement, so far as those Indians are concerned? Is not the trust, as to them, fully executed? Did the Choctaws and Chickasaws, by the treaty of 1866,

authorize the United States, not only to settle Indians on a part of the lands, in the leased district, but also to settle whites on a part of those lands, and to divert the proceeds of the sales to such white settlers, from the Choctaws and Chickasaws, to other Indians? If the moneys realized from these lands, can be paid to other Indians, why can they not be paid to whites, or blacks, or even paid into the treasury of the United States? Is there any such relation between the settlement, on the allotted tracts of 169,600 acres, and the proceeds of the sale of the surplus tracts of 574,010 acres, as to entitle the settlers on the former to the proceeds of the latter?

A condition to *settle Indians*, on a tract of land, is not a condition to *sell* that land, and pay the moneys, realized from the sale, to Indians, or to anybody else. A condition to settle Indians on lands, within prescribed exterior boundaries, is not a condidion to settle Indians on parcels of land, within the boundaries so defined, and to sell the rest to white settlers, for the benefit either of Indians, or of whites, or of blacks, or of the United States. I submit that the proceeds of the sales of these lands will be the equitable property of the Choctaws and Chickasaws, and cannot be diverted to the Wichita and affiliated bands. I submit that, if the United States shall give, to the Wichita and affiliated bands, any moneys on account of these lands, the gift must go out of the treasury of the United States, and not out of the proceeds of the sales of the lands.

Suppose it had been true that the government of the United States had, in some way, incurred an obligation to the Wichitas, which could only be discharged, by allotting to each individual 160 acres of the land, and distributing among them a sum of money equal to the proceeds of the sales of the residue of the reservation. That fact could

not impair, or affect the obligation of the United States to pay, to the Choctaws and Chickasaws, the value of land, in the leased district, devoted to general settlement. This supposed obligation to the Wichitas could not cancel the obligation to the Choctaws and Chickasaws. The United States can not rightfully use the property of the Choctaws and Chickasaws, to discharge an obligation to the Wichitas, and, thereby, extinguish the right of the Choctaws and Chickasaws to compensation for their property.

Third.

THE CHOCTAWS AND CHICKASAWS ARE ENTITLED TO DEMAND EITHER A RESTORATION OF THE LAND, OR JUST COMPENSATION THEREFOR.

The appellants contend that the United States can only be held responsible for injuries resulting to the claimants, from the opening of the land in controversy to general settlement; that no injury can result therefrom; and that the case is, therefore, one of *damnum absque injuria*. This contention is based on the assumption that the case of the Choctaws and Chickasaws rests on a breach of covenant, for which the covenant-breaker is only to respond in damages. This is a mistake. The legal title, which is transferred to the United States, by the treaty of 1866, is accompanied by, (1) a trust to settle friendly Indians on the land; (2) a power to select the friendly Indians to be so settled, which power of appointment, although not absolutely general and unrestricted, is broad enough, in scope, to include any friendly Indians in the United States; (3) a condition subsequent, which is the execution of the trust and power; and (4) a covenant to execute the trust.

The execution of the trust is imperative. It would be so, even if there were no covenant.

If this conveyance were a transaction between private persons, involving no trust, or condition, but only a covenant, the grantor would be entitled to demand either damages for a breach of the covenant, or a specific performance; but he would not be entitled to demand either the forfeiture of the estate, or the removal of a trustee. To an action for damages it would be competent for the defendant, if the plaintiff had suffered no injury, to interpose the defence, *damnum absque injuria*. But, inasmuch as the cession of 1866 was a conditional conveyance, a breach of the condition, whether injurious or beneficial, to the grantor, would work a forfeiture of the estate, and entitle him to a recovery of the land. The question of damages would be wholly foreign to that remedy. And since this cession is, at the same time, a conveyance in trust, a violation of the trust would entitle the grantor to demand that the trustee should be removed and deprived of the estate. If, therefore, the conveyance had been from one private person to another, the grantor would have been entitled to elect either one of four remedies.

But the appellees ask neither damages for breach of covenant, nor a specific performance of the contract, nor a removal of the trustee. They cannot obtain a restoration of the land, to which a plaintiff would, in a like case between private parties, be entitled, because the government of the United States, in the exercise of its paramount power of eminent domain, can override the forfeiture and take the land for public use, making due compensation therefor. What the appellees ask, therefore, is the value of the land. If they were citizens of the United States, demanding the enforcement of a forfeiture of the land in controversy, for a breach of the condition of the

conveyance, and the government of the United States, exercising its power of eminent domain, should take and hold the land for public use, the constitution would exact, as compensation, the just value of the land. That value exceeds $40,000,000. The only reason why the claimants can not demand that amount of compensation seems to be that the government of the United States, having sovereign power over the appellees, has, in the jurisdictional act, fixed the maximum compensation recoverable at a small fraction of the actual value of the land. Stuyvesant *v.* New York, 11 Paige, 414; Gray *v.* Blanchard, 8 Pick. (Mass.) 284; Woodruff *v.* Waterpower Co., 10 N. J. Eq. 489; Chapman *v.* Pingree, 67 Me. 198; 4 Kent Com. 123; Cowell *v.* Springs Co., 100 U. S. 55; Hale *v.* Finch, 104 U. S. 261; Hill *v.* Barclay, 18 Ves. 56; Rolfe *v.* Harris, 2 Price Exch. 207; Bracebridge *v.* Buckley, Id. 200; Bank *v.* Smith, 3 Gill & Johns, 265; Schermerhorn *v.* Negus, 1 Denio 450; Holden *v.* Joy, 17 Wall. 211; Schulenberg *v.* Harriman, 21 Wall. 44; Mead *v.* Ballard, 7 Wall. 290.

REPLY TO CONTENTIONS OF APPELLANTS IN OPPOSITION TO THE TITLE OF THE APPELLEES.

1. One of the positions of the Choctaws and Chickasaws in this case, is that, by the treaty of 1820, the United States ceded to the Choctaws territory which included the leased district, and also 8,000,000 acres of land west of the 100th meridian of west longitude; and that a large part of the sum of $800,000, paid to the Choctaws and Chickasaws, under the treaty of 1855, was applicable to the quitclaim of the land west of the 100th meridian. The counsel for the government contended, in the court below, that the Choctaws and Chickasaws

never owned any land west of the 100th meridian, and that, therefore, no part of the $800,000 was paid for the quitclaim. But he conceded that the Choctaws had owned the leased district, and contended that, therefore, the whole of the $800,000 must have been paid for the lease.

The position that the Choctaws never owned any land west of the 100th meridian cannot be maintained. On the 18th of October, 1820, Generals Andrew Jackson and Thomas Hinds, commissioners on the part of the United States, signed a treaty, by which the Choctaw nation ceded to the United States, certain lands, described by metes and bounds, east of the Mississippi river, and, in exchange therefor, the United States ceded to the Choctaw nation certain lands, described by metes and bounds, west of the Mississippi river. The following are the first and second articles of the treaty:

Article 1. To enable the president of the United States to carry into effect the above grand and humane objects, the Mingoes, head men and warriors of the Choctaw nation, in full council assembled, in behalf of themselves and the said nation, do, by these presents, cede to the United States of America all the land lying and being within the boundaries following, to wit: Beginning on the Choctaw boundary, east of Pearl river, at a point due south of the White Oak spring, on the old Indian path; thence north to said spring; thence northwardly to a black oak standing on the Natchez road, about forty poles eastwardly from Doake's fence, marked A. J. and blazed, with two large pines and a black oak standing near thereto and marked as pointers; thence a straight line to the head of Black creek or Bouge Loosa; thence down Black creek or Bouge Loosa to a small lake; thence a direct course so as to strike the Mississippi one mile below the mouth of the Arkansas river; thence down the Mississippi to our boundary; thence around and along the same to the beginning.

Article 2. For and in consideration of the foregoing cession on the part of the Choctaw nation and in part satisfaction for the same, the commissioners of the United States in behalf of said states do hereby cede to said nation a tract of country west of the Mississippi river situate between the Arkansas and Red river and bounded as follows: Beginning on the Arkansas river where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian fork, and up the same to its source; thence due south to the Red river; thence down Red river three miles below the mouth of Little river, which empties itself into Red river on the north side; thence a direct line to the beginning. Appendix, 10.

Here was an exchange of lands between the United States and the Choctaw nation. The consideration for which the Choctaws ceded to the United States certain lands east of the Mississippi *was not a part of the land* included within the metes and bounds of the western country ceded to them by the United States, *but was the whole of the land* included within those metes and bounds. If it had happened that a part of the land covered by this deed of the United States to the Choctaws was not in fact and in law owned by the United States on the 18th day of October, 1820, when the treaty was signed, the obligation of the United States would have been identical with the obligation incurred by an individual who, being a party to an exchange of farms, should prove not to be the owner of all the land covered by his deed.

In that event it would have become the duty of the United States to do one of four things: Either to acquire a complete title to all the land covered by their deed, and to convey the same to the Choctaws; or to restore to the Choctaws a part of their land east of the Mississippi river; or to rescind the treaty altogether and place the parties *in statu quo;* or, finally, to make just reimbursement in money for the land purchased and paid for by the Choctaws, but not delivered by the United States.

If it had been true that on the 18th day of October, 1820, the date of the exchange of lands between the United States and the Choctaw nation, the United States had owned no lands between the Red and Canadian rivers west of the one hundredth meridian of west longitude, then unless the United States had subsequently acquired and conveyed such lands, or restored to the Choctaws a part of their land east of the Mississippi river, or rescinded the treaty, the United States would have become bound to make just compensation to the Choctaws in money for

the lands deeded but not delivered to them. So it would have to come to pass that when the Choctaws, on the 22d day of June, 1855, relinquished their interest in the lands west of the one hundredth meridian, the interest so relinquished, as between the Choctaws and the United States, would have been precisely as valuable if the United States had not owned these lands on the 18th of October, 1820, as it would have been if the United States had owned the lands on that day. In one case it would have been the land itself which the Choctaws relinquished on the 22d day of June, 1855; in the other case it would have been an indisputable claim for the just value of the lands which the Choctaws relinquished.

But while the reimbursement, to which the Choctaws would have been entitled for the relinquishment of their interest in these lands west of the one hundredth meridian of longitude in 1855, would have been the same whether the lands did or did not belong to the United States on the 18th day of October, 1820, when the exchange was made, the fact is that on that day these lands did belong to the United States, having been acquired from France, by the treaty of April 30, 1803. The dissenting judge says (p. 79) that, in 1820, "the western boundary of the United States was the one hundredth degree west longitude." But the proofs show that he is mistaken.

On that day the United States owned, not only the country east of the one hundredth meridian, including the leased district and the land now occupied by the Choctaws and Chickasaws, but also all the land bounded by that meridian on the east, by the Canadian river on the north, by the Red river on the south, and on the west by a straight line drawn from the headwaters of the Canadian river to the headwaters of the Red river.

The title of France to the province of Louisiana, in-

cluding the land just described, was based upon the following grounds:

During the seventeenth and eighteenth centuries, all the European powers recognized, as rules of international law, the following principles.

(*a*) The sovereign, whose subjects first discovered a river, in the western hemisphere, acquired exclusive dominion over all territory lying between branches of that river, not previously discovered by subjects of other sovereigns.

(*b*) The sovereign, whose subjects first discovered a line of sea-coast, on the American continent, acquired dominion over all territory lying between all rivers entering the sea on that coast.

(*c*) In the case of discoveries by subjects of different sovereigns, at different points on the same coast, the most convenient line between such points, at proximately equal distances therefrom, became the common boundary of the territories of the respective sovereigns.

In 1673 Joliet and Marquette descended the Mississippi river to the Arkansas. In 1680 Henison descended the Mississippi to its mouth. In 1682 La Salle and Joutel descended that river to its mouth, with sixty men. These explorers were all French subjects. In 1685 La Salle built Fort Franc, on the Bay of St. Bernard, now Matagorda bay, and established, in that locality, a colony of 240 French immigrants. There was, at that time, no Spanish settlement, or discovery, nearer than Panuco, on the river of that name. The Rio Bravo del Norte, although somewhat nearer to Matagorda bay than to Panuco, afforded the most convenient midway boundary between the provinces of France and Spain. The sources of the Red and Canadian rivers were east of and near to the Rio Bravo del Norte.

The result of the application of the rules of international law, above stated, to the facts of the case was that, during the years 1680–1685, France became invested with the sovereignty of the province named (from her king) Louisiana, extending from the Mississippi river, on the east, to the Rio Bravo del Norte, and Rocky Mountains on the west, and from the Gulf of Mexico, northward, beyond the fortieth parallel of north latitude.

The adoption and observance by the European powers, of the above-mentioned rules relating to discoveries in America, and the facts relating to the discovery of Louisiana, are shown by proof which ought to be conclusive upon the government of the United States, because that government is itself the witness that furnishes most of the evidence. This evidence will be found in the following documents filed as claimants' evidence in chief.

(1) The letter of James Madison, secretary of state, to Mr. Livingston, minister to France, dated January 31, 1804. Am. St. Papers, For. Rel., v. 2, p. 574. Appendix 70

(2) Secretary Madison's letter of instructions to James Monroe and Charles Pinckney, ministers to Spain, dated April 15, 1804, and his further instructions to the same ministers, dated July 8, 1804. Id. p. 360. App. 71.

(3) Minister Monroe's letter to M. Talleyrand, minister of France, dated November 8, 1804. Id. 643. App. 72

(4) The letter of Ministers Monroe and Pinckney to the Spanish minister, dated April 20, 1805. Id. 663, 664.

(5) The letter of James Monroe, secretary of state, to the Spanish minister, dated June 10, 1816. Am. St. Papers, For. Rel., v. 4, p. 430. App. 77

(6) The letter of John Quincy Adams, secretary of state, to the Spanish minister, dated March 12, 1818. Id. 470 to 479. App. 78

(7) The letter of Secretary Adams to the Spanish minister, dated October 31, 1818. Id. 530. App. 84

(8) The letter of Secretary Adams to the Spanish minister, dated May 3, 1820, eight months after the Spanish treaty had expired by its own limitation. Id. 684. Rec. 67.

(9) The memoir of Luis de Onis, who signed the Spanish treaty on behalf of Spain, mentioned in the letter of Minister Forsyth, to Secretary Adams, dated September 21, 1820. Id. 693. Rec.

(10) De l'Isle's map, Paris, 1703. Rec. 78.

(11) Moll's map, London, 1711. Rec. 79.

(12) Moll's map, London, 1715. Rec. 80.

(13) De l'Isle's map, Amsterdam, 1718. Rec. 81.

(14) De l'Isle's map, Amsterdam, 1722. Rec 82.

(15) Popple's map, London, 1733. Rec 83

(16) Popple's map, London, 1735. Rec. 84.

(17) De l'Isle's map, Amsterdam, 1739. Rec. 84.

(18) Boehme's map, 1846. Rec. 85.

(19) American Maps, Vol. 1, Nos. 16, 17, 18. Rec. 86.

(20) American Maps, " 2, " 10. Rec. 88.

(21) De l'Isle's Atlas Nouveau, Vol. 1, No. 68. Rec. 86.

(22) De l'Isle's Atlas Nouveau, " 2, " 38, 39. Rec. 89.

(23) Bowen's Atlas of the World, No. 56.

This tract of land, bounded on the north by the Canadian river, on the east by the one hundredth meridian, on the south by the Red river, and on the west by a line drawn from the headwaters of the Canadian river to the headwaters of the Red river, which became a part of the province of Louisiana, upon the original acquisition of that province by France, continued to be a part of Louisiana until France ceded the province to Spain on the 3d of November, 1762. It continued to be a part of the province of Louisiana during the period of 38 years from the cession by France to Spain in 1762 to the retrocession by Spain to France in 1800. It remained a part of Louisiana from the retrocession by Spain to France in

1800 to the cession by France to the United States in 1803. And, finally, it continued to be a part of Louisiana from 1803 until the treaty of October 18, 1820, between the United States and the Choctaws, and was ceded by that treaty to the Choctaw nation. These facts are established by the proofs just cited.

Now it happened that there was an inconsistency between the *natural objects* and one of the *courses* specified in the conveyance made by the United States to the Choctaws in the treaty of October 18, 1820. It is a fact that a line drawn *due south* from the *source of the Canadian* will not touch the *Red river*, because the source of the Red river is one degree of longitude further eastward than the source of the Canadian.

But Mr. Justice Story, delivering the opinion of the supreme court in Preston's Heirs *v.* Bowman, 6 Wheat., 580, laid it down as "a universal rule that course and distance yield to natural and ascertained objects." And in Newsom *v.* Prior, 7 Wheat., 7, Chief Justice Marshall said:

> The courts of Tennessee, and all other courts by whom cases of this description have been decided, have adopted the same principle and adhered to it. It is that the most material and most certain calls shall control those which are less material and less certain. A call for a natural object, as a river, or a known stream, a spring, or even a marked tree, shall control both course and distance.

It is unnecessary to cite the numerous authorities, by which this principle has been recognized and approved.

Applying these rules of law to the case under consideration, we find that two of the calls of this conveyance to the Choctaw nation are for *natural objects*, namely; first, the *source* of the Canadian river; and, second, the *Red river;* that a third call is for a *course* connecting the Red river with the source of the Canadian; that this course, being due south from the source of the Canadian,

inconsistent with the other two calls, because the ource of the Canadian is further west than that of the ed river; and that this third call is therefore controlled y the other two calls of the description. The result is at the Red river and the source of the Canadian are to e connected by a straight line drawn from the source of e Canadian to the nearest point of the Red river, which earest point happens to be the source of the Red river. But on the map prepared in the Indian office, in 1895, d now on file in that office, the source of the Canadian ver is located west of 104° 30′ west longitude, and the ource of the Red river west of 103° 30′ west longitude. he map No. 39, appellees' evidence in chief, is an accu- te tracing from that map, the townships being deline- ed on the scale of those in the Chickasaw nation. This ap shows the area of the land owned by the Choctaws est of the one hundredth meridian, to be 8,225,280 res.

When the Choctaws relinquished their interest in this nd, on the 22d day of June, 1855, they were entitled to ceive, in compensation for that relinquishment, either e value which the land bore in 1820, which must have ceeded four cents per acre, amounting, with interest five per centum, to $888,329; or the value which it bore 1855. At the price of 10 cents per acre this land nounted in value, in 1855, to $822,528. But in the eaty of June 22, 1855, the sum of $800,000 was consti- ted the entire pecuniary consideration, not only for the linquishment by the Choctaws of their interest in the nd west of the one hundredth meridian, but also for the se by the Choctaws and Chickasaws to the United ates of the land between the ninety-eighth and one ndredth meridians. That sum was not, in fact, suf- ient to compensate the Choctaws for the relinquish-

ment of the land west of the one hundredth meridian. No part of it was *justly* applicable to the lease of the land between the ninety-eighth and one hundredth meridians, which amounted to 7,713,239 acres. Regarding the case in the light of strict justice, we must conclude that the United States held this land, from 1855 until 1892, without making any compensation therefor to the Choctaws and Chickasaws.

The considerations which reconciled the Choctaws and Chickasaws to this lease were the uses to which the lands were devoted. In the first place, by the express terms of the lease, the lands were to be used exclusively for the settlement of bands or tribes of friendly Indians; in the second place, they were to remain open to settlement by the Choctaws and Chickasaws themselves, who, while residing there, were, by articles 3, 7 and 9 of the treaty, placed under the jurisdiction of the Choctaw nation.

2. The counsel for the United States, I repeat, did not deny that the Choctaw treaty of 1820 conveyed the leased district to the Choctaws; but he contended that it conveyed no land west of that district. He insisted that inasmuch as the western boundary, defined in the Quapaw treaty of 1818, was the same as that defined in the Choctaw treaty of 1820, (viz., a line drawn south from the source of the Canadian to Big Red river) and it was *not* the *intention* of the parties to the Quapaw treaty that any land west of the 100th meridian should be conveyed by that treaty, therefore it could not have been the intention of the parties to the Choctaw treaty that any land west of the 100th meridian should be conveyed by that treaty.

His first proposition in maintenance of this contention was that the maps of Pike, Arrowsmith, Pinkerton, Melish, and Darby proved that the parties to the Quapaw treaty of 1818 must have intended to fix the western boundary

of the Quapaw cession on or near the 100th meridian. The source of the Canadian is located on the meridian of 97° 5′, by Arrowsmith; on that of 97° 15′, by Pinkerton; on that of 99° 45′, by Melish; on that of 100° 18′, by Pike; and on that of 99° 5′, by Darby. There is no proof that any party, to the Quapaw treaty of 1818, had ever seen, or heard of either of those maps, before the ratification of that treaty. But the counsel thought that the mere existence of the maps was evidence that their contents were known, not only to the president, secretaries of state and war, and senate, and to Messrs. Clark and Chouteau, who signed the Quapaw treaty, but also to the thirteen Quapaws who signed it. At the same time he insisted, as we shall see, that the presence of Major Long's first report in the war office, from November, 1820, to January 8, 1821, the date of the ratification of the Choctaw treaty, which report showed the source of the Canadian to be west of the 103d meridian, was no evidence that this report was known to any of the treaty-making authorities of the United States, before the latter date.

There is neither proof, nor probability, that, in the negotiation, or ratification, of the Quapaw treaty, either the Quapaws, or Commissioners Clark and Chouteau, or the president, secretary of state, secretary of war, or senate, ever gave a moment's thought to the question of the longitude of the source of the Canadian. It is certain that, if the parties to the Quapaw treaty had made the 100th meridian the western boundary of the cession, they would have taken, for that boundary, a meridian on which the source of the Canadian is not located, on any one of the thousands of maps now on file in the library of congress. The intention of the parties to the treaty was to make a line, drawn from the source of the Canadian, south, to the Red river, the western boundary of the cession, whatever might prove

to be the longitude of its source. In this transaction, not a word was spoken, on the subject of longitudes, by the president, the secretary of state, the secretary of war, or the senate. With them all it was, "up the Canadian Fork to its source, thence south to Big Red river," and nothing else.

But then, the United States were not the only parties to the Quapaw treaty. The Quapaws themselves were parties. They were the grantors. What was their belief respecting the longitude of the source of the Canadian? The counsel assumed that they must have been familiar with the maps of Arrowsmith, Pinkerton, Pike, Melish, and Darby, and must have considered the various longitudes of the source of the Canadian, indicated on those maps, and must have concluded arbitrarily to adopt one differing from them all, to wit, the 100th meridian.

The Quapaw chiefs and warriors neither spoke nor thought of longitude. When they assented to the line extending south, from the source of the Canadian, they had no more thought of the 100th meridian than of the 1000th meridian. When they assented to a boundary, fixed by concrete natural objects, it was not their purpose to assent to a boundary by abstractions. They were as ignorant of longitudes as of logarithms. But they knew what the source of a river was; and they perfectly understood what it signified, as an element of a boundary line. It was not a source of the Canadian at 100°, or at 100° 18′, or at 99° 45′, or at 97° 5′, or on any other meridian, that they had in mind, when they signed the treaty. What they had in mind was the *source of the Canadian*, wherever located.

The counsel, to use his own words, asserted that in 1818 the whole civilized world believed that the source of the Canadian was east of the 100th meridian. I think that in

1818 not one hundred men, in the civilized world, believed anything on the subject, and that not a single man, in the civilized world, had any ground for any belief as to the precise longitude of the source of that river. It is not probable that the president of the United States, now in office, or any of his cabinet ministers, or any ten senators or representatives, now in office, ever saw one of those five maps.

If it was the purpose of the makers of the Quapaw treaty to make a meridian of longitude, numbered by degrees, the western boundary of the cession, why did they not make such a meridian its western boundary? Why did they say: "Up the Canadian Fork to its source, thence south to Big Red river?" Why did they not say: "Up the Canadian Fork to the 100th degree of west longitude, thence south to Big Red river?" If it was their purpose to make the source of the Canadian a point, in the western boundary of the cession, and, at the same time, to define, or fix the longitude of that point, why did they deliberately thwart their own purpose? Why did they not say: "Up the Canadian Fork to its source, on the 100th meridian of west longitude, thence south to the Big Red river?"

But if the parties to the Quapaw treaty had, in 1818, entertained the belief that the source of the Canadian was on the 100th meridian, it would not follow that even they entertained the same belief, at the date of the Choctaw treaty, in 1820. The fact that the Quapaws entertained that belief, in 1818, would not prove that the Choctaws entertained it, either in 1820 or in 1818. The fact that Messrs. Clark and Chouteau entertained it, in 1818, would not prove that Generals Jackson and Hinds entertained it, either in 1820 or in 1818. Nor would the fact that the treaty-making authorities of the United States supposed, in 1818, that the source of the Canadian was at 97° 5′, 97°

15′, 99° 45′, or 100° 18′, or on any other particular meridian, prove that they supposed so at the date of the ratification of the Choctaw treaty; for, meantime, facts might have come to light, to change their belief on this point. But this illegitimate inference of counsel is rebutted by the facts soon to be considered.

3. The counsel for the United States contended that, if the treaty of 1820 did invest the Choctaws with a title to the land west of the 100th meridian, or to its value, that title was extinguished by the treaty of 1830. He based this contention upon three grounds as follows:

(1) The treaty of 1830 ceded the leased district to the Choctaws.

(2) It was stipulated, in the treaty of 1830, that if any provision of any prior treaty was inconsistent with any provision of the treaty of 1830, such prior treaty should, in its entirety, become null and void.

(3) If the cession of 1820 embraced land west of the 100th meridian, that cession was inconsistent with the cession of 1830, and the earlier treaty was, therefore, nullified by the later treaty.

But the treaty of 1830 neither contained, nor purported to contain, the cession of any land whatever to the Choctaws. There are no words in the treaty either expressing or implying such a cession. The provision is, not for a *cession* of land owned by the United States, but for a *formal patent* of land which had been ceded to the Choctaws, in 1820, and had been their unquestioned property for a period of ten years. A valid cession of the leased district, by the United States, to the Choctaws in 1830 was a legal impossibility; as certainly so as would have been a valid cession of the British islands, or of one of the provinces of the Chinese empire.

In part payment for the Choctaw lands in Mississippi,

the United States had sold and conveyed territory including the leased district, with the land west of it, to the Choctaws, in 1820; and it was not the purpose of the United States, in 1820, to obtain from the Choctaws their Mississippi lands, *by a void sale of the leased district.* The cession of 1820 absolutely divested the United States of title to the leased district, and, from 1820 until 1830, the United States made no pretense of ownership thereof. The assertion that the treaty of 1830 ceded the leased district to the Choctaws, is, therefore, erroneous.

There is no inconsistency between the cession of 1820 and the formal patent of 1830. The treaty of 1820 ceded land extending westward to the source of the Canadian. The treaty of 1830 ceded nothing, to the Choctaws, but provided for a formal deed of a *part of the land ceded in* 1820. It did not provide for a deed of that part of the cession of 1820, which was west of the 100th meridian, for the obvious reason that that land had, before 1830, become the property of Spain, and could not be made the subject of a deed by the president of the United States.

If it were true that an inconsistency between any provision of the treaty of 1830, and any provision of the treaty of 1820, rendered the treaty of 1820, "in its entirety, null and void," and were also true that such inconsistency actually existed, the Choctaws would now be the lawful owners of 5,169,788 acres of land in the state of Mississippi. In the first article of the treaty of 1820, the Choctaws ceded to the United States a tract of land *carved out of their Mississippi possessions, and described by metes and bounds,* containing 5,169,788 acres. In 1830 that land was, and for a period of ten years had been, the property of the United States. Not a vestige of title thereto remained in the Choctaws. But the Choctaws were still the owners of 7,796,000 acres of land in Mississippi, contig-

nous to the land ceded in 1820 to the United States. By the second article of the treaty of 1830 they ceded to the United States *all the land they then owned in Mississippi.* They ceded the tract of 7,796,000 acres. These are the words of the treaty:

Article 3. In consideration of the provisions, contained in the several articles of this treaty, the Choctaw nation of Indians consent and hereby cede to the United States, the entire country they own and possess, east of the Mississippi river.

The treaty of 1830, then, did not cede to the United States the land which was ceded by the treaty of 1820, but ceded land not embraced in the cession of 1820. The United States never acquired the tract of 5,169,788 acres otherwise than by the treaty of 1820. *It follows, of course, that if the treaty of* 1820 *was nullified, in its entirety, by the treaty of* 1830, *the cession of Mississippi lands, by the Choctaws, to the United States, made in the treaty of* 1820, *was nullified by the treaty of* 1830, *and those Mississippi lands are now the property of the Choctaws.*

It may be suggested that the title to the Mississippi lands, which were ceded to the United States by the treaty of 1820, was so vested in the United States, by that treaty, that it could not be divested by the treaty of 1830. But that is a blade that cuts both ways. If the title to those lands was so vested in the United States, by the treaty of 1820, that it could not be divested by the treaty of 1830, then, of course, for the same reason, the title of the Choctaws to the land west of the 100th meridian was so vested, by the treaty of 1820, that it could not be divested by the treaty of 1830. But then, suppose the title of the United States to the lands acquired under the treaty of 1820 was incapable of divestiture by the treaty of 1830. That would not affect the obligation of the United States to pay to the Choctaws the value of those lands, if the treaty of 1820 was, in fact, nullified, by the treaty of 1830.

4. The counsel for the government insisted that, inasmuch as the United States had previously stipulated, in an unratified treaty, to cede, to Spain, in exchange for Florida, all the land, between the Canadian and Red rivers, west of the 100th meridian, it could not have been the intention, of any of the parties to the Choctaw treaty of 1820, that the land ceded to the Choctaws should extend westward, beyond that meridian. The facts are these. The treaty was signed February 22, 1819. It was first approved by the senate, February 24, 1819. The king of Spain refused to ratify it, and it expired, by its own limitation, on the 22d of August, 1819. Although defunct it was ratified, by the king of Spain, on the 24th of October, 1820. But its resurrection was not an accomplished fact, until it was approved by the senate and ratified by the president on the 19th of February, 1821.

A treaty, which has been signed by the representatives of all the governments which are parties thereto, and has been ratified by one of them, is obligatory on the government which has ratified it, until the expiration of the period limited, by its terms, for the exchange of ratifications. If, at the expiration of that period, it has not been ratified by all the parties, it ceases to be obligatory on the government which has ratified it, and cannot be revived and made obligatory, without further action of that government.

The fact that on the 22d day of February, 1819, Secretary Adams signed the Spanish treaty, is certainly evidence that, on that day, he intended to cede to Spain all the land, between the Canadian and Red rivers, west of the 100th meridian. So is the fact that, on the 19th of February, 1821, the senate approved the Spanish treaty evidence that the senate then intended to approve the cession of that land to Spain. But neither those two

facts, nor any other known facts, are evidence that, on the 18th of October, 1820, when the Choctaw treaty was signed, or on the 21st of December, 1820, when it was approved by the senate, or on the 8th of January, 1821, when it was ratified by the president, there was any purpose, on the part of President Monroe, or Secretary Adams, or the senate, to make such a cession. For, in the first place, it was entirely competent for the United States, having ceded this land to the Choctaws, afterwards, in the exercise of the right of eminent domain, to cede the same land to Spain. And in the next place, the Spanish treaty which was signed on the 22d of February, 1819, expired on the 22d day of August, 1819, six months after it was signed, for want of ratification by the king of Spain. On the 18th of October, 1820, the 21st of December, 1820, and the 8th of January, 1821, it was still dead. This is shown by the messages and diplomatic correspondence of President Monroe, Secretary Adams, and Minister Forsyth.

On the 12th of August, 1819, ten days before the treaty of February 22, 1819, expired, Mr. Forsyth, our minister to Spain, in a letter to Señor Salmon, the acting secretary of state, served upon the Spanish government the following official notice:

On the 12th day of August His Majesty's government gives notice, by your note of the 10th—of its determination to ratify? no, sir, to send a person to Washington, possessing the confidence of the king, and having the necessary qualifications to terminate this affair. Can it have escaped the observation of this government that this affair must terminate in ten days? While a failure to resolve finishes the business, in a few days, this government thinks that a definite resolution cannot be taken, without first entering into various explanations with the United States, to some of which the government of the said United States has given occasion. * * The determination to send a messenger to the United States, for explanations, at this period, when his voyage, as it regards the convention, must be useless; and the only hope, which can be entertained from it, is that a new negotiation may be commenced,—a circumstance of especial weight, when it is recollected that this messenger might have been sent to Washington, the desired explanation might

have been asked and given, there, prior to the 22d of August, if the king, your master, had decided promptly, on this course. Or is it in the inexplicable and studious avoidance of the natural order of proceeding, in a case of this kind—an application to the minister of the United States near the court of his Majesty, for these necessary explanations, when they might have been possibly long since given, and still may be given before the period arrives, when the convention of the 22d February ceases to be obligatory upon the parties to it? Am. St. Papers, For. Rel., v. 4, pp. 656, 657. Appendix, 85.

That "period" arrived on the 22d of August, 1819, six months after the treaty was signed.

On the 21st of August, 1819, the day before the treaty expired, Mr. Forsyth served on the Spanish government the following notice:

He has the honor to announce that, after the 22d day of the present month, as the ratification of the convention of 22d February will not have been exchanged, all the claims and pretensions of the United States, which, with the spirit of moderation, the love of peace, and the delusive expectation that all causes of difference and dispute with Spain, would be thereby adjusted and settled, they consented to modify or waive, will stand in the same situation as if that convention had never been made; that the United States will hold themselves free to press and enforce them, in any and every mode, consistent with honor, that their interest may require. Am. St. Papers, Id. p. 661. Appx. 86.

In a communication sent to the Spanish minister, on the 8th of May, 1820, Mr. Forsyth says:

What then must have been the sentiments of the president, upon finding, by your note of the 14th ultimo, that instead of explanations, His Catholic Majesty has instructed you to demand the negotiation of another treaty, and to call upon the United States for stipulations derogatory to their honor and incompatible with their duties, as an independent nation? * * The ratification of that treaty can now no longer be accepted by this government, without the concurrence of a constitutional majority of the senate of the United States, to whom it must be again referred. Am. St. Papers, Id. p. 687. Appx. 87

On the 3d of May, 1820, Mr. Adams sent to the Spanish minister a letter, which concluded with the following paragraph:

But it is proper to apprise you that, if this offer be not accepted, the United States, besides being entitled to resume all the rights, claims and pretensions, which they had renounced by the treaty, can no longer consent to relinquish their claims of indemnity and those of their citizens from Spain for all the injuries which they have suffered and are suffering, by the delay of His Catholic Majesty to ratify the treaty. The amount of claims of citizens of the United States, which existed at the

time when the treaty was signed, far exceeded that which the United States consented to accept, as indemnity. The right of territory was and yet is to the Rio del Norte. I am instructed to declare that, if any further delay to the ratification, by His Catholic Majesty, of the treaty, should occur, the United States could not hereafter accept, either of $5,000,000 for the indemnities due to their citizens by Spain, nor of the Sabine for the boundary between the United States and the Spanish territories. Am. St. Papers, id. p. 684.

On the 9th of May, 1820, President Monroe sent identical messages to the two houses of congress, in which, after giving notice of the refusal of Spain to ratify the treaty of February 22, 1819, he said:

The result, therefore, is that the treaty is declared to have no obligation whatever; that its ratification is made to depend, not on the considerations, which led to its adoption, but on a new article, unconnected with it, respecting which a new negotiation must be opened of indefinite duration and doubtful issue. * * The attitude of the United States must now be assumed, on full consideration of what is now due to their rights, their interest and honour, without regard to the powers or incidents of the late mission. Am. St. Papers, id. pp. 676, 677.

On the 12th of July, 1820, Secretary Calhoun addressed the following letter to General Jackson:

DEPARTMENT OF WAR, *July* 12, 1820.

DEAR SIR: I have received your letter of the 19th ultimo, and am happy to find that you have consented to serve as a commissioner to hold a treaty with the Choctaw Indians, and I herewith enclose your commision and instructions.

I cannot designate particularly the lands which it would be desirable to give to the Choctaws, in exchange for theirs, not being sufficiently acquainted with the localities of the country, west of the Mississippi, belonging to the United States. In my general letter of instructions to the commissioners, you will observe that they may be located anywhere on the Quapaw purchase, and I should suppose the farther to the south and west the better.

I have the honor to be, &c.,

J. C. CALHOUN

General ANDREW JACKSON,
Nashville, Tennessee.

The first meeting of the commissioners and Choctaws, in council, occurred October 10, 1820. Only a few Choctaws were present. The minutes of the council, for that day, are printed on pages 235 to 237 of volume 2, American State Papers, Indian Affairs, commencing as follows:

OCTOBER 10, 1820.

In conformity with an appointment made by the commissioners, they met the chiefs, headmen and warriors of the Choctaw nation, in council, this day. They informed them that, although their runners had not returned, yet they had determined to deliver a talk to those now present. They also observed that the same talk would be given to those who were absent, as soon as they arrived. It was as follows: * * afpl. 148.

This "talk" contained no reference to the boundaries of the proposed cession.

The Choctaws next met the commissioners, in council, October 14, 1820. The minutes of the commissioners, for October 13, 1820, contain the following entry. Id. p. 238.

OCTOBER 13, 1820.

Puck-she-nub-bee, a principal chief of the nation, informed the commissioners that some of his headmen and warriors were disposed to go into council, and it was the wish of others to have a ball-play. He stated that he did not wish to mix his business, but to do one thing at a time. The commissioners replied that his view of the duty set was a correct one; that if his headmen and warriors were disposed to indulge themselves in amusement, it might be proper to gratify them, as they had no disposition to hurry them, in their determinations. This chief then remarked that they would proceed, on to-day, with the ball-play, and on to-morrow go into council. In the meantime he expressed a wish that the commissioners would furnish their definitive propositions; which were accordingly submitted to them, in manuscript, late this evening. The following is a copy:

CHOCTAW TREATY GROUND, *October* 13, 1820.

Friends and Brothers:

In order to carry into effect the grand and friendly object, which your father, the president of the United States, has in view, for securing the happiness and protection of all his Choctaw children, he proposes to give you a large country west of the Mississippi river. It will be laid off adjoining your Cherokee brothers, so that each can protect and befriend the other. THE LIMITS WILL EXTEND FROM THE ARKANSAS RIVER, WHERE THE CHEROKEE LINE BEGINS, SOUTH TO THE RED RIVER, AND WEST TO THE HEAD SOURCE OF THE ARKANSAS RIVER. Your father, the president, wishes to collect all his Choctaw children, who have already gone over the Mississippi, as well as those who are straggling about in every direction.

afpl. 143, 144.

This document proves that Generals Jackson and Hinds did not intend that the 100th meridian should be the western boundary of the Choctaw lands, unless they were both prevaricators of the worst stamp. But notwithstanding this explicit assurance, of Generals Jackson and

Hinds, that the cession was to extend to the headwaters of the Arkansas, west of the 103d meridian, the dissenting judge thinks it "safe to assume" (p. 79) that they intended that the 100th meridian should be the western boundary of the cession. There is not the slightest ground for imputing a want of candor to either of these commissioners. This document proves also that President Monroe, Secretary Adams and Secretary Calhoun entertained no such purpose; for, if they had, they would have communicated it to Generals Jackson and Hinds.

The minutes of the commissioners, for October 14, 1820, commence as follows:

OCTOBER 14, 1820.

The preceding talk was interpreted to the chiefs, headmen, and warriors of the Choctaw nation, this morning. The commissioners represented to them the importance of the subject, to which it related, and wished them all to hear it. It was a matter of deep concern, and they recommended them to listen and deliberate, with great attention. They observed that it was put in writing, in order that it might be read, in council, and that they might understand it well. * *

Immediately after hearing the above talk, the chiefs, headmen, and warriors went into council and were, for some time, engaged in discussing the propositions submitted to them as the basis of a treaty. The commissioners received no report from them as to the result. The chiefs, headmen and warriors, asked to be indulged with further time to deliberate, as it was a subject of uncommon magnitude to the nation. The commissioners replied that the course which they proposed was a prudent one, and that they would wait on them with patience; it was not their wish that they should be precipitate, but that their determination should be the result of mature reflection; then all the Choctaw nation would be satisfied, and their true and lasting interests successfully promoted.

The next meeting, in council, occurred October 17, 1820. The commissioners delivered another "talk;" but it contained no allusion to boundaries. The minutes of October 18, 1820, contain only the following entry:

OCTOBER 18, 1820.

Agreeably to appointment the commissioners met the chiefs, headmen, and warriors of the Choctaw nation, in council, this day; and, after having read and explained to them the different articles of the treaty, submitted it to them for signature.

The following letter from S. H. Long, major of topo-

graphical engineers, was received by the war department, in November, 1820:

BELLE POINT, *September* 14, 1820.

Sir: * *

I regret that, for want of a guide and a proper knowledge of the country, that the detachment accompanying me were led into a mistake, and explored the Canadian of the Arkansaw, instead of the Red river. On parting from Capt. B's detachment, we proceeded southwardly about 50 miles further, *in view of the mountains*, and came to a brook running in a southwestwardly direction, which, according to Pike's map and description of the country, our only guide, we took to be a branch of Red River. After pursuing it downward, more than 100 miles, we fell in with a party of Indians, of the nation of Bad Hearts, who confirmed us in this opinion, by repeatedly assuring us that the stream, on which we were traveling, was Red River. Having traversed it, by our courses, about 800 miles, by its meanderings, more than 1,000, we arrived at its confluence with the Arkansaw, and discovered our error, when it was too late to retrieve it.

* * S. H. LONG,
Maj. U. S. T. Engrs.

Hon. J. C. CALHOUN,
Sec. of War.

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This letter showed that the source of the Canadian was west of the 103d meridian. In Major Long's report of February 20, 1821, offered in evidence by the government, he says:

The Canadian rises at the base of the Rocky mountains, and, after a wandering course of about one thousand miles, enters the Arkansas, at a distance of about 550 miles from the mouth of the latter. This river has generally been represented, upon the maps of the country, as having a Easterly course; whereas its source is nearly in the same latitude at its confluence with the Arkansaw; consequently its general course is nearly East.

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In the presence of the facts that the Spanish treaty expired on the 22d of August, 1819; that it was in the power 14 months before the negotiation of the Choctaw treaty began, and remained there more than a month after the Choctaw treaty was ratified and proclaimed;—in view of the reiterated notifications of the death of the Spanish treaty, given to the senate, to the house of representatives, and to the Spanish government, by President Monroe, Secretary Adams, and Minister Forsyth;—

in the presence of these facts and official proceedings, the position, that the treaty-making authorities of the United States could not have intended to cede to the Choctaws any land west of the 100th meridian, because the Spanish treaty was pending, would seem to be wholly untenable.

Equally untenable is the position that the Choctaws, themselves, understood the cession to be limited by the 100th meridian, notwithstanding the assurance of Generals Jackson and Hinds that it was to extend to the "head source of the Arkansas." The assumption that the 103 Choctaws, who signed the treaty, had critically examined the maps of Arrowsmith, Pinkerton, Pike, Melish and Darby, is of course, absolutely unwarranted.

So also, is the assumption that Major Long's letter was not known, to the treaty-making authorities of the United States, before the Choctaw treaty was ratified.

This letter was dated September 14, 1820. It was received at the war office sometime in November, 1820. The exact day of its receipt is unknown. If it was received before November 8, it was in the possession of the government more than two months before the ratification of the Choctaw treaty, "by the president, by and with the advice and consent of the senate." If it was received, on the last day of November, it was in the possession of the government more than one month before the ratification of that treaty. This letter was accessible to John C. Calhoun, the secretary of war, to John Quincy Adams, the secretary of state, and to James Monroe, the president. It was the duty of these officials, not only to know the contents of the letter, themselves, but also to inform the senate of its contents, because, at that time, the Choctaw treaty had been signed by Generals Jackson and Hinds, and was awaiting the action of the president and senate.

And the presumption of the law is, not that this duty was neglected, but that it was duly performed.

I submit that the fact that Major Long's letter, of September 14, 1820, was in the possession of the government a month, or two months, before the Choctaw treaty was ratified, not only proves that the government had at hand the means of ascertaining that the source of the Canadian was west of the 103d meridian, but also affords presumptive circumstantial proof that the government did know that it was so located. I think that this circumstantial proof raises a presumption strong enough to cast upon the government the burden of proving that it had no such knowledge. I think that this burden is not shaken off, by the mere assertion that there is no evidence that the secretary of war communicated such information to the president, or senate. Indeed I go further than required by the exigency of the case, and contend that, even if it had been shown that the president and senate had no actual knowledge of this letter, the government should be held to a constructive knowledge of its contents.

There is not the slightest ground for supposing that the Choctaws, in the negotiation of the treaty of 1829, spoke or thought of longitudes. Not a word was spoken to them, by a government official, indicating a purpose to make the 100th meridian the western boundary of the Choctaw cession. There is no proof that the Choctaws had ever examined, or seen, or heard of one of the five maps, upon which the appellants relied, or that they supposed the source of the Canadian to be on, or near, the 100th meridian. On the contrary, Generals Jackson and Hinds had, four days before the treaty was signed, given the Choctaws their deliberate assurance, in writing, that their cession was to extend "to the head source of the Arkansas river," which was further west than the source of the Canadian.

They knew that the treaty, on its face, ceded to them a territory bounded, on the west, by a line drawn south, from the source of the Canadian, to the Red river. They did not know, or suspect, nor did they have any reason to know, or suspect, that, when the government fixed this line, as their western boundary, it intended to make, not this line, but the 100th meridian their western boundary. There is not the slightest basis for the assumption that the Choctaws understood the United States to cede, not what they did in express terms cede, but what they did not in terms cede. And the government understood that while the Choctaws, in 1820, neither knew, nor cared to know, or hear, anything about meridians of longitude, they well knew what the source of a river was, and could appreciate that, as an element of a boundary line.

The Choctaw treaty was made, in the state of Mississippi, 78 years ago. Since 1820 the Choctaws have made most creditable progress, in knowledge and in civilization. But seventy-eight years ago they had not passed the stage of semi-barbarism. Their "book-learning" was below zero. Their cartography was a minus quantity. They neither knew nor cared anything about longitudes or latitudes. They wanted their western country to extend to the *source of the Canadian*. Whether it extended 100 degrees, or 1,000 degrees west of Greenwich, was all the same to them. They were incapable of even considering the question of its longitude.

Even though the treaty-making authorities of the United States had believed the source of the Canadian to be near the 100th meridian, and had intended, in the Choctaw treaty of 1820, to make that meridian the western boundary of the Choctaw cession in disregard of the express terms of the treaty, that meridian would not have become its western boundary if the Choctaws had no such belief or

intention. If, in this exchange of lands, the United States had intended to make the 100th meridian the western boundary of the cession to the Choctaws notwithstanding the explicit language of the grant, but had failed to inform the Choctaws as to their purpose, the United States would, of course, have been bound by the language of the treaty.

The Choctaws could not be held, by a secret purpose of the United States to fix a boundary, different from that expressly defined in the treaty. The United States could not, after the assurance, which their commissioners, Jackson and Hinds, gave to the Choctaws, that their land would extend to the head source of the Arkansas river, substitute, for the boundary prescribed in the treaty, a boundary not therein prescribed, without previous notice to the Choctaws of such intended substitution, and acquiescence therein on the part of the Choctaws. In this case, there is no proof, or possibility of proof, that the United States notified the Choctaws that they proposed to substitute the 100th meridian, for the western boundary defined in the treaty.

I submit that the United States are to be held to that sense of the treaty, in which they permitted the Choctaws to understand it. *A fortiori* are they to be held to that sense, in which, through their agents, Generals Jackson and Hinds, they solemnly assured the Choctaws it was to be executed.

But then, if the parties to the Choctaw treaty had supposed the source of the Canadian to be, either on the meridian of 97° 5′, or on the meridian of 99° 45′, it would not have followed that they did not intend to stand by the words of the treaty extending the cession to the source of the Canadian, whatever might prove to be the location of its source, but intended to make the arbitrarily selected

meridian of 100° the western boundary of the cession, instead of a line drawn from the source of the Canadian to the Red river.

5. The counsel insisted that, although the senate, on the 19th of February, 1821, did "consent to and advise" the president to ratify the Spanish treaty for the second time, the president did not ask the senate to do anything of the kind, because further action, on the part of the senate, was not essential to the validity of the treaty. But if further action, on the part of the senate, had not been, in the judgment of the president, essential to the validity of the treaty, he certainly would not have sent the treaty to the senate, on the 14th of February; he would have exchanged ratifications with the Spanish minister, upon receipt of the notice, which the Spanish minister gave, on the 12th of February, of his readiness for an exchange of ratifications; he would thereupon have made proclamation of the treaty, without sending it to the senate at all. It is evident, not only that further action, on the part of the senate, was essential to the resurrection and validity of the treaty, but also that the president and senate understood such further action to be necessary, and acted accordingly. The senate resolution of February 19, 1821, approving the second ratification of the treaty, as originally reported by the committee, was framed as follows:

Resolved, (two-thirds of the senators present concurring therein) That the senate do advise and consent to the ratification of the treaty of amity, settlement, and limits, made and concluded at Washington, on the 22d day of February, in the year of our Lord 1819, between the United States of America and his Catholic Majesty.

As adopted by the senate, the resolution took the following form:

Resolved, (two-thirds of the senators present concurring therein) That the senate, having examined the treaty of amity, settlement, and limits, between the United States of America and his Catholic Majesty, made

and concluded on the 22d of February, 1819, and seen and considered the ratification thereof, made by his said Catholic Majesty, on the 24th day of October, 1820, do consent to and advise the president of the United States to ratify the same.

There may possibly be room for doubt whether the resolution, in its original form, required a *subsequent* ratification by the president. The words were: "Resolved, That the senate do advise and consent to the ratification of the treaty." There is, however, no room for doubt as to the import of the resolution actually adopted. The senate obviously consented to and advised a *subsequent* ratification. The words of the resolution are: "Resolved, That the senate do consent to and advise the president of the United States to ratify the same."

Now, it is not the ratification of a treaty, by one or both of the parties, that carries the obligation of the parties, by relation, back to the date of the signing of the treaty. It is the *exchange* of ratifications that has that effect. The exchange of ratifications is an international act. But the ratification, itself, is a domestic act. It does not acquire any international character until the exchange of ratifications takes place. Until then it is wholly within the cognizance and control of the party whose act it is. It may be withheld or rescinded. Inasmuch, then, as the ratification of 1819 could have acquired no international character, until the exchange of ratifications, in 1821, the ratification of 1819, if it had been delivered in 1821, to the Spanish minister, in exchange for the Spanish ratification of October, 1820, would have become operative, as an international act, only when the exchange of ratifications occurred. If its date had not been changed by the pen, it would necessarily have been changed by the fact. It would have been a ratification subsequent to the adoption of the senate resolution of February 19, 1821. Whether the president signed a new instrument,

or used the old paper, with or without a change in its date, we are not informed. Nor is information on this point material to the case. If the president had not, in one way or another, ratified the treaty *after* the adoption of the senate resolution, his act would have been unconstitutional, because not performed with the consent and by the advice of the senate.

6. The counsel for the government claimed that the United States ceded nothing to Spain, by the treaty which was ratified February 19, 1821. This was a mistake. On the 15th of April, 1804, James Madison, the secretary of state, instructed our ministers to Spain as follows:

> No final cession is to be made to Spain of any part of the territory on *this side of the Rio Bravo*, but in the event of a cession to the United States of the territory east of the Perdido.

On the 8th of July, 1804, Secretary Madison instructed the same ministers as follows:

> It is to be understood that a perpetual relinquishment of the territory *between the Rio Bravo and Colorado* is not to be made, nor the sum of ——— dollars paid, without the entire cession of the Floridas.

On the 12th of March, 1818, Mr. Adams, then secretary of state, in an official letter to the Spanish minister, said:

> Well might Messrs. Pinckney and Monroe write to Mr. Cevallos, in 1805, that the claim of the United States to the boundary of the Rio Bravo was as clear as their right to the island of New Orleans.

President Monroe held, October 31, 1818, that the claim of the United States to the boundary of the Rio Bravo was too clear to admit of question; and he directed his secretary of state, Mr. John Quincy Adams, to forbear discussing their title with the Spanish minister. De Onis, the Spanish negotiator, in his memoir, said that, by the treaty, Florida was exchanged for Texas. Every president and secretary of state, from 1804 to 1820, decided officially that the territory of the United States, acquired

from France in 1803, extended westward to the Rio Bravo and the Rocky mountains.

The Spanish treaty embraced a cession to Spain, of all the territory west of the line agreed upon as the future boundary, between the United States and the Spanish possessions. Duplicates of this treaty were signed by the negotiators, one in the Spanish and the other in the English language. The corresponding paragraphs differ from each other, in the Spanish and English versions of the treaty, not only in the order of the ceding clauses, but also in the words of the clause setting forth the action of Spain. In both versions the cession, by the United States, takes the same form as follows:

> The United States hereby cede to his Catholic Majesty, and renounce forever all their rights, claims, and pretensions to, the territories lying west and south of the above-described line.

The counsel for the government was of the opinion that while, by the terms of the treaty, the *rights* of the United States to this land were ceded, the land itself was not ceded. I think the land was ceded, and the rights, claims, and pretensions renounced. I think the clause, if expanded, would take this form:

> The United States hereby cede to his Catholic Majesty the territories lying west and south of the above-described line, and renounce all their rights, claims, and pretensions to those lands.

But if the United States then actually owned the land, a cession of all their rights therein would obviously have been exactly tantamount to a cession of the land itself.

The action of Spain, as set forth in the Spanish version, which version, as decided in Arredondo's case, fixed the obligation of Spain, is different. It is this:

> His Catholic Majesty renounces and cedes forever, for himself and his heirs and successors, all the rights which he holds to the territories east and north of said line.

He cedes rights; he does not in terms cede lands. If

he had owned lands east, or north, of the line, this language would, of course, have transferred them. But he owned no lands so situated.

7. In maintenance of his position that, although the parties to the Choctaw treaty, in express terms, extended the cession westward to the source of the Canadian, they intended to extend it only to the 100th meridian, the counsel for the United States said:

> When a deed names a boundary line, which is supposed, by the parties, to have a certain location, but which is really located elsewhere, it has repeatedly been held that the intention must control the meaning of the words of the deed.

This was an inaccurate statement of a familiar principle of law. The counsel seemed not only to misunderstand the rule, but also to fail to perceive that the authorities cited by himself were fatal to his contention. The rule is this: Where a deed names an object, whether natural or artificial, as one of the calls, and the evidence shows that there are, in the locality, two or more objects to which the name or designation is applicable, a latent ambiguity, in the call, is disclosed, and evidence will be admissible to cure the ambiguity and show the intention of the parties. As for example, when one of the calls is for the "Lunenburg line," or the "Shirley line," or the "Derry old line," if it be shown that there are two or more different lines, in the locality, to which the designation is applicable, the latent ambiguity, thus disclosed by evidence, may be explained and removed by evidence. This rule is recognized in each of the four cased cited by the counsel. But it has no applicability to the case at bar.

Another principle is, that where there is, in the locality, only one object bearing the designation used in a call, a mistake, respecting the *location* of that object, does not present a latent ambiguity in the call, and any inconsist-

ency in the calls must be corrected, not by evidence *aliunde*, but by giving to the calls for natural objects control of the calls for courses and distances.

The counsel cited four authorities. In Croghan *v.* Nelson, 3 How. 187, the first case cited, the question was whether, in a locator's entry in the Kentucky land office, calls for *quantity* controlled calls for *course*. The calls included a call for quantity (1,000 acres) and four calls for boundary lines, the first and fourth being for natural objects,—a bayou and a creek connected together, and the second and third for movable artificial lines connected with each other, and, together, connecting extremities of the first and second lines. The court held that, under the Kentucky laws, the call for 1,000 acres controlled the calls for the courses of the movable lines and said:

> The great and leading object of every entry is to obtain the *quantity* of land specified in it; every other call, therefore, must be regarded as intended to effect this principal object, and as subordinate thereto. The call to run a line parallel with the first, or base line, is, therefore, repugnant to the call to include the quantity, and must be rejected.

In the case at bar, the "great and leading object" was not to obtain a specified quantity of land. There was no specification of quantity, or call for quantity, in the treaty. There were calls for two natural objects, the source of the Canadian and the Red river, and for a course connecting those natural objects. It is not material to inquire whether the rule is the same, at common law, or under international law, as under the Kentucky statute; for no question arises, in the case at bar, bearing the remotest analogy to the question decided in Croghan *v.* Nelson. In that case the question was whether, in a Kentucky land office entry, a call for quantity controlled a call for course. In the case at bar, the question is whether, in the case of a call naming, as a corner in a boundary, a natural object, to which alone the designation is applicable, it is compe-

tent to show, by evidence *aliunde*, that the parties did not intend to make such natural object a corner, but intended to locate that corner at a distance of 200 miles from the natural object expressly designated in the treaty.

If the "Canadian river" had two branches, approximately equal in length and volume, both of greater length and volume than any others, the river would have two sources. In that case, a call for the "source of the Canadian river" would be ambiguous, and evidence to show which source was intended would be competent. But the Canadian has only one stream, to whose head the term "source of the Canadian river" can be, or ever has been, applied. There is but one "source of the Canadian river." There was, therefore, no ambiguity in the term "source of the Canadian river." Evidence showing that the parties supposed the longitude of that source to be four degrees farther east than it was, would disclose a mistake, but would disclose no ambiguity in the call. Proof of a mistake, respecting the location of a natural object, which is not, at the same time, a mistake as to its identity, discloses no ambiguity in its designation, and affords no ground for the admission of evidence, to show that the parties to the deed did not mean what they expressly said.

In Cook *v.* Babcock, 7 Cush., Mass. 526, which is the second case cited by the counsel, the question was whether, in the absence of proof that there were two "lines of Blandford," one the true line, and the other a reputed line, it was competent to show, by evidence, that the parties intended to make a line different from the true line one of the boundaries of the land. One of the calls was for a course, "north on the line of Blandford." Before the date of the plaintiff's deed, that line had been established, by an act of the legislature. The plaintiff

ed evidence to show that, before the legislature fixed line, it had been "understood and reputed to run ier north," than the line so established; and he con-ed that his land extended to this "understood and ted" line. Chief Justice Shaw, delivering the unani-s opinion of the court, said:

en the description, in a deed or devise, is clear and explicit, and with-ubiguity, there is no room for construction, or for the admission of evidence, to prove that the parties intended something different. veyance of land, like a devise of land, is required, by law, to be in g, and registration is provided for, for the information of all s. It is the intention of the parties, thus expressed and recorded, ot an intent to be proved aliunde and not expressed, which must n. When, indeed, upon application of the description to the land, loubtful what was intended, this is a latent ambiguity, and thus ice aliunde may be given; as when the description gives the line ning to a maple tree, marked, and two maple trees are found, of which would answer the description. So, here, if the words had the "reputed" line, or the "supposed" line, or words of that ption. But the deed from Herrick to Clark, on which the question was made after the dividing line between Blandford and Chester een established by law, and must be presumed to have been known parties, from the use they have made of it in the deed as a monu-* * Nor is it enough to prove a mistake in the deed, by show-om the conveyancer or any other evidence, that the grantor in-l to convey by a supposed old line, not then the true town line.

Putnam *v.* Bond, 100 Mass. 58, the third case cited, vidence showed that there were two "Lunenburg ," one "*considered by everybody, including the parties e deed*," to be the real line, the other being the true d line. The question was whether evidence was ad-ible to explain and cure this ambiguity in the call. e Gray held that this evidence disclosed a latent guity in the description, and, that the Lunenburg *which was considered by everybody, including the ies to the deed, to be the real Lunenburg line*, was to be as the line referred to, in the ambiguous convey-

in the case at bar, one of the calls had named a line h was not a natural object, and the evidence had dis-d that there were two lines of the same name, one the

lawfully established line, and the other considered the true line, *by everybody, including the parties to the treaty*, there would have been disclosed a latent ambiguity in the description, and the case of Cook *v.* Babcock would have been available, as an authority for accepting the latter, as the boundary referred to in the treaty.

In Hall *v.* Davis, 36 N. H. 569, the fourth case cited, one of the calls of the deed was for "Derry old line," and one of the questions, in the court below, was whether, in the absence of proof that there were two "Derry old lines," this call could be controlled by parol proof. The supreme court said:

> To the second ruling of the court below, rightly understood, we can discover no valid objection, although it was apparently unnecessary, save to meet an assumption of the plaintiffs. The located line would seem very clearly to have been the true original line of Londonderry; and, if it were so, whether the parties understood the deed to refer to "Derry old line," as a located line, or not, was wholly immaterial, unless the language of the deed contained a latent ambiguity; for that language having named "Derry old line," as the boundary of the lot, when "Derry old line" was shown to be an actually located line, that located line must be the boundary of the parties, whatever their understanding or intention might have been.

The court proceeds to say that, if the evidence had shown that there was a second line, called "Derry old line," it would have disclosed a latent ambiguity, and it would then have been competent for the parties to show in what sense the expression was used.

The reason for excluding proof of the intention of the parties, is, if possible, still stronger, in the case at bar, than it was in the case of Hall *v.* Davis; for in that case the call in question was a call for an artificial line, but in the case at bar, the call in question is for a natural object.

8. Another ground, on which the counsel for the government contended that the parties to the Choctaw treaty of 1820 intended to make the 100th meridian the western boundary of the Choctaw cession, was that, whereas a

ine drawn due south, from the true source of the Cana-
lian, which is west of the meridian of 104° 30′, would
ot touch the Red river, but would pass to the west of its
ource, a line drawn due south from the Canadian, on the
00th meridian, would strike the Red river, and, there-
ore, the parties must have intended to make the 100th
eridian the western boundary of the cession.

Precisely the same reasoning would prove that the
arties intended to make any and every one of more than
0,000 different meridians, between 100° and 103° 30′, the
estern boundary of the land. For a line drawn due
outh, on the meridian of any second, or fraction of a
econd, of longitude, between 100° and 103° 30′, will in-
rsect the Red river, the source of which is west of the
eridian of 103° 30′.

9. In maintenance of his contention that the Choctaw
eaty of 1820 invested the Choctaws with no title to any
nd west of the 100th meridian, the counsel for the
nited States invoked the familiar rule that, by the ex-
hange of ratifications of a treaty, the obligations of the
arties to each other, therein assumed, are made to date
om the time when the treaty was signed. If a treaty,
tween two independent sovereign powers, A and B,
all be signed, on the 1st of February, 1898, and the
tifications exchanged on the 1st day of July, 1898, the
bligations of the two parties *to each other*, therein as-
med, will date back to the time when the treaty was
gned. If a treaty, between A and a third party, C,
all be signed on the first day of March, 1898, and the
tifications exchanged on the 1st day of June, 1898, the
rms of the treaty between A and B and the date of
gning being known to C, it will not be competent for C,
der the law of nations, to acquire from A, by the sec-
d treaty, any rights in prejudice of the rights secured
B, by the first treaty.

But if the treaty, between A and B, shall be a secret treaty, and its terms and the fact and date of signing shall be unknown to C, then the second treaty, having been first in exchange of ratifications, will prevail over the other; and if the first treaty shall embrace a cession of land, from A to B, and the second a cession of the same land from A to C, all the parties to both treaties being independent sovereign powers, the title of C to the ceded lands will, under the law of nations, be good, as against both A and B. B will be compelled to look to A for redress of grievances. If, in the case at bar, the Choctaw nation had been an independent sovereign power, the Choctaw title to land west of the 100th meridian would have been valid from January 8, 1821, the date of the proclamation of the Choctaw treaty, notwithstanding the final ratification of the Spanish treaty, on the 19th day of February, 1821. If England had been in the place of the Choctaw nation, England, and not Spain, would have become the owner of the land. But inasmuch as the Choctaw nation, instead of being an independent sovereignty, was a dependent state, subject to the paramount power of eminent domain vested in the government of the United States, the final ratification of the Spanish treaty was effective to transfer to the king of Spain the land of the Choctaws west of the 100th meridian.

There is another rule of international law, intimately connected with the foregoing rule. It is this: If either party to a treaty shall refuse, or neglect, to ratify it, within the period of time limited, by its terms, for the exchange of ratifications, the party in default will be powerless, by a subsequent ratification, to effectuate a resurrection of the treaty, without further action by the party not in default. It will be for the party not in default to determine whether the treaty shall or shall not be restored to life.

If the party not in default shall again ratify the treaty and ratifications shall be exchanged, then, *as between the parties to the treaty*, the obligations therein assumed will date back to the day when the treaty was signed. But if, before the exchange of ratifications, a treaty between the party not in default and a third sovereignty, C, shall be concluded and ratified, without notice to C of previous negotiations between A and B, a cession of land in the treaty between A and C, will prevail over a cession of the same land in a treaty between A and B. In the case now before the court, the cession to the Choctaws would prevail over the cession to Spain, if the Choctaw nation had been an independent sovereign state, like England, instead of being subject, as it was, to the superior sovereignty and paramount power of eminent domain of the United States. If the treaty which was made with the Choctaws, in 1820, had been made with England, Spain would have acquired no title to the land in controversy, by the treaty which was finally ratified on the 19th of February, 1821. England would have held the land.

It was contended that in the case of the United States v. Arredondo, 6 Peters 691, the supreme court held that no person, not a citizen, could, between the date of signing a treaty and the date of the exchange of ratifications, acquire any rights in conflict with those conferred by the treaty. The doctrine of the Arredono case was evidently misunderstood. The treaty, by which Spain ceded Florida to the United States, was signed, as already stated, on the 22d of February, 1819, and ratifications were exchanged on, or soon after, February 19, 1821. Before February 22, 1819, the king of Spain had granted certain lands in Florida to Arredondo, upon condition that he should establish 200 Spanish families on the lands within three years from the date of the grant. A general pro-

vision, of article 8 of the Spanish treaty, permitted Arredondo to establish these families on the land, within three years "from the *date* of this treaty." But he did not establish the 200 families on the land before the expiration of three years from the date of the *signing* of the treaty. And one of the questions, in the case, was whether, so far as his rights were concerned, the *date* of the treaty was the date of signing, or the date of the ratification. The court said:

It is lastly objected that the extension of time, by the intendant, in December, 1820, was without authority, being subsequent to the ratification of the treaty by the king of Spain. But the ratification by the United States was in February following; and the treaty did not take effect till its ratification by both parties operated, like the delivery of a deed, to make it the binding act of both. That it may and does relate to its date, as between the two governments, so far as respects the rights of either under it, may be undoubted; but as respects individual rights, in any way affected by it, a very different rule ought to prevail. If the question was new, in this court, we should have no hesitation in saying that as to the grant of land subject to the condition of settlement, the *ratification* of the treaty must be taken as its *date*. But the question is not a new one.

The court then cite as authorities 4 Cranch 1, 65; 4 Dall. 199.

In Haver *v.* Yaker, 9 Wall. 32, 34, the court said:

It is undoubtedly true, as a principle of international law, that as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard, the exchange of ratifications has a retroactive effect, confirming the treaty from its date. But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them it is not considered as concluded, until there is an exchange of ratifications; and this we understand to have been decided by this court, in Arredondo's case, reported in 6th Peters. The reason of the rule is apparent. In this country a treaty is something more than a contract, for the federal constitution declares it to be the law of the land. If so, before it can become a law the senate, in whom rests the authority to ratify it, must agree to it. But the senate are not required to adopt or reject it as a whole, but may modify or amend it, as was done with the treaty under consideration. As the individual citizen, on whose rights of property it operates, has no means of knowing anything of it while before the senate, it would be wrong in principle, to hold him bound by it as the law of the land, until it was ratified and proclaimed. And to construe the law so as to make the ratification of the treaty date back to its signing, thereby divesting a title already vested, would be manifestly unjust, and cannot be sanctioned.

In this case of Haver *v.* Yaker, the question was whether rights, acquired before the exchange of ratifications, by an individual not a party to the treaty, were affected by the treaty. In the case at bar, the question is whether rights, acquired by an Indian nation, prior to the exchange of ratification, are affected by the treaty. In both cases the rule and the reason for the rule are obviously the same. And, but for the fact that the United States were invested with the paramount power of eminent domain over the land west of the 100th meridian, the title of the Choctaws to that land would not have been extinguished by the treaty with Spain.

10. The counsel for the Wichitas contended that the treaty of 1820 did not convey to the Choctaws, either the leased district, or the land west of the leased district, (1) because the Quapaws held no right of occupancy therein, and, therefore, conveyed no title thereto by the treaty of 1818, and (2) because the Wichitas themselves held the right of aboriginal occupancy in the entire leased district and other lands.

But even if the aboriginal title to these lands had been held, not by the Quapaws, but wholly by the Wichitas, this position of counsel would not be tenable. In British America the ultimate fee of all lands encumbered with the right of Indian occupancy, was in the British crown, previous to the revolution, and in the states afterwards. It was encumbered by the Indian right of occupancy, but was subject to grant. Clark *v.* Smith, 13 Peters, 195. See, also, Fletcher *v.* Peck, 6 Cranch, 87; United States *v.* Clark, 9 Peters, 168. The Cherokee Nation *v.* Georgia, 5 Pet. 1; Johnson *v.* McIntosh, 8 Wheat. 543; United States *v.* Cook, 19 Wall. 591; Veeder *v.* Greppy, 3 Wis. 502; Jackson *v.* Hudson, 3 Johns. (N. Y.) 375; Beecher *v.* Wetherby, 95 U. S. 517.

In the province of Louisiana the fee of the land was in the crowns of France and Spain, from 1685 to 1803, and, since 1803, has been in the government of the United States, subject to the Indian right of occupancy. Since the acquisition of Louisiana, by the United States, in 1803, it has not been possible for any Indian tribe to acquire such a right of occupancy, in that province, as could constitute an incumbrance on the fee-simple title of the United States.

An Indian right of occupancy could not prevent a conveyance, by the United States, of a fee-simple title clear of the Indian incumbrance. It could only impose upon the United States the obligation to make due compensation for the loss of occupancy of the land. For this nation, like every other sovereignty, is invested with the power of eminent domain,—the power to take private property for public use. This is an inherent, indispensable, and inalienable power of sovereignty. It extends to every acre of land within the exterior limits of the republic. It is recognized alike by the public law of nations, and by our written constitution, which makes the payment of just compensation for the property a condition of the exercise of the power. Whenever a treaty becomes essential to the public welfare, and the cession of private property real or personal becomes essential to the consummation of the treaty, the taking of the property, for that purpose, is a taking for public use; and the treaty, *proprio vigore*, takes the private property, converts it into public property, and effectuates the transfer.

All this was true in the case of the Choctaw treaty of 1820. In order to secure the removal of the Choctaws from the State of Mississippi, and to consummate the purchase of 5,169,788 acres of their Mississippi lands, it became necessary for the United States to cede to the

Choctaws the western lands described, by metes and bounds, in the second article of the treaty of 1820. If any part of the land embraced within those boundaries was the property of the Wichitas, the United States, by that treaty, took the land for public use, transformed it into public property, and ceded it to the Choctaws. If the Wichitas were not the owners of any part of the ceded land, they can claim no compensation for its loss. If they were its owners, they have a claim for compensation against the United States. But it is a caim absolutely dissevered from the land. They have no vendor's lien, or other lien upon it, no equitable or reversionary interest therein, no conditional interest of any kind atttached to or running with the land, any more than they would have, if the land had been ceded to the king of England.

Suppose that, when the Choctaw treaty of 1820 was made, General Jackson had notified the Choctaws that the Wichitas held a right of occupancy in the leased district. I submit that the Choctaws would not have exchanged their Mississippi country for an estate in the land between the Red and Canadian rivers, encumbered by a right of occupancy held by other tribes.

11. It was claimed that the phraseology of article 10 of the treaty of June 22, 1855, tended to establish the position that the stipulated payment of $800,000 must have been applicable to the lease of the district between the 98th and 100th meridians. The following is the text of this article:

Article 10. In consideration of the foregoing relinquishment and lease, and as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct.

It was asserted that the Chickasaws had no rights connected with the land west of the 100th meridian, and

therefore the provision that, one-fourth of the sum of $800,000 should be paid to them, implied that the payment of $800,000 was exclusively applicable to the lease. But in the first place, the Chickasaws did, in fact, then hold rights connected with the lands, between the Red and Canadian rivers, west of the 100th meridian. Their interest therein was, in character, identical with the corresponding interest of the Choctaws. It was inferior in extent, because the Chickasaws were inferior in numbers to the Choctaws. The Choctaws were entitled to three-fourths and the Chickasaws to one-fourth of the compensation for the relinquishment of title to this land. The Choctaws conveyed this interest to the Chickasaws by a provision in article 1 of the convention of January 17, 1837, as follows:

> Article 1. It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country, to be held on the same terms that the Choctaws now hold it, except the right of disposing of it, which is held in common with the Choctaws and Chickasaws, to be called the Chickasaw district of the Choctaw nation, to have an equal representation in their general council, and to be placed on an equal footing, in every other respect, with any of the other districts of said nation, except a voice in the management of the consideration which is given for these rights and privileges: and the Chickasaw people to be entitled to all the rights and privileges of Choctaws, with the exception of participating in the Choctaw annuities, and the consideration to be paid for these rights and privileges, and to be subject to the same laws to which the Choctaws are: but the Chickasaws reserve to themselves the sole right and privilege of controlling and managing the residue of their funds, as far as is consistent with the late treaty between the said people and the government of the United States, and of making such regulations and electing such officers, for that purpose, as they may think proper.

In all the rights and privileges of the Choctaws except the right to the Choctaw annuities, and to the money paid by the Chickasaws to the Choctaws, the Chickasaws became participants, such rights and privileges being held in common, three-fourths by the Choctaws, and one-fourth by the Chickasaws. The rights, so acquired by the Chickasaws, included the right to one-fourth of the

compensation for the land west of the 100th meridian, which the United States had sold to the Choctaws, and had subsequently sold and conveyed to the king of Spain.

But then, in the next place, if the Chickasaws had not been holders in common of this right of reclamation, as against the United States, the question, whether a part of the $800,000, should be paid to the Chickasaws, was a question between the Choctaws and Chickasaws. If, in view of the intimate political and proprietary relations, which had been established between the two nations by the convention of 1837, and had continued for eighteen years, the Choctaws had seen fit to permit the Chickasaws to receive one-fourth of the $800,000, that arrangement would have concerned the Choctaws and Chickasaws only.

12. The counsel for the United States contended that the fact that, in the treaty of June 22, 1855, the Chickasaws did not join in the quitclaim of the land west of the 100th meridian, was proof that all of the payment of $800,000, was applicable to the leased district. This was a mistake. In 1837 the Choctaws held no interest in any *land* west of that meridian. By the Spanish treaty, their interest in that land had been extinguished, and all that remained to them was an interest in its money value. One-fourth of that money interest was all that was secured to the Chickasaws by the treaty of 1837. But in 1854, the land being again within the limits of the United States, the Choctaws insisted that they were still its owners, and importunately demanded to be "repossessed" of it. It was in response to this demand that the United States inserted in the treaty of 1855 a relinquishment of the land. Provision was made in the treaty, *not for a relinquishment of any title to the money value of the land, but for a relinquishment* of all right, title, and interest in and to the *land itself*. The treaty of 1855 contains the following clauses:

And whereas the United States desire that the Choctaw Indians shall relinquish all claim to any *territory* west of the 100th degree of west longitude. * *

The Choctaw Indians do hereby absolutely and forever quitclaim and relinquish to the United States all their right, title and interest, in and to any and all *lands*, west of the 100th degree of west longitude.

If the title to the money had been relinquished, the Chickasaws could have properly joined in such relinquishment. But they could not quitclaim any title to the land, because they had never either held or claimed any title thereto. On the other hand, they were entitled to one-fourth of the money value of the land, and were, therefore, properly made the payees of one-fourth of the money, to be paid for the quitclaim.

In the treaty of 1855 the parties said they agreed that the sum of $800,000 should be paid to the Choctaws and Chickasaws, for the quitclaim of the land west of the 100th meridian *and* the lease of the land between the 98th and 100th meridians. This is what they said: "In consideration of the foregoing *relinquishment and lease*, and as soon as practicable after the ratification of this convention the United States will pay, &c." The counsel for the appellants asserted that the parties to the treaty were mistaken when they said this. They asserted that the parties to the treaty did not agree to pay the sum of $800,000 for the relinquishment *and* lease,—but did agree to pay every dollar of the sum of $800,000 for the lease alone, and the dissenting judge is of the same opinion (p. 80). On the contrary, I submit that inasmuch as the 8,000,000 acres of land quitclaimed amounted, in value, to many times $800,000, it is incredible that when the parties said they agreed that the sum of $800,000 should be paid for the quitclaim *and* lease, they did not mean what they said, but meant that it should all be paid for the lease alone.

13. It was contended that ten cents per acre would have

been an excessive price for the 8,000,000 acres west of the 100th meridian, in 1855, because Bonaparte ceded the whole of Louisiana to the United States for 80,000,000 francs, in 1803. But there had been great changes, in this region, between the years 1803 and 1855. During that interval of time four new states and five new territories had made their appearance in this province, which was practically a wilderness in 1803. And there were other reasons for the small price accepted by Bonaparte for Louisiana. President Jefferson did not ask of France or desire anything more, in Louisiana, than the city of New Orleans, which is situated, not on the right bank, but on the left bank of the Mississippi river. Bonaparte, through his minister M. Talleyrand, first proposed the sale of the entire province of Louisiana to the United States. The reason he did so was twofold. (1) He was about to engage in a war with England; and he well knew that before it ended England would wrest Louisiana from France; and (2) he needed money for the war in which he was about to engage. The question, with him, was whether a friendly power should acquire the province, by treaty, for 80,000,000 francs, or the hereditary enemy of France should acquire it, by force, for nothing. And President Jefferson accepted a proffered cession which he had not solicited.

To substantiate this statement I cite from the second volume of American State Papers, page 547, a paragraph in a dispatch from Minister Livingston to President Jefferson, dated March 12, 1803, as follows:

> I broke off this part of my letter to attend Madame Bonaparte's drawing-room, where a circumstance happened of sufficient importance to merit your attention. * * After the First Consul had gone the circuit of one room, he turned to me and made some of the common inquiries usual on these occasions. He afterwards returned and entered into a further conversation. When he quitted me, he passed most of the other ministers merely with a bow, went up to Lord Whitworth, and, after the

first civilities, said: "I find, my lord, your nation want war again." L. W.: "No, sir, we are very desirous of peace." First Consul: "You have just finished a war of fifteen years." L. W.: "It is true, sir, and that war was fifteen years too long." Consul: "But you want another war of fifteen years." L. W.: "Pardon me, sir, we are very desirous of peace." Consul: "*I must either have Malta or war.*" L. W.: "I am not prepared, sir, to speak on that subject, and I can only assure you, Citizen First Consul, that we wish for peace." The prefect of the palace then came up to the Consul, and informed him that there were ladies in the next room, and asked him to go in. He made no reply, but bowing hastily to the company, retired immediately to his cabinet, without entering the other room.

Five days later Minister King sent to Secretary Madison the following dispatch:

LONDON, *March* 17, 1803.

SIR: War seems more and more probable; indeed it appears to me inevitable. Holland will be involved, and Spain and Portugal must obey the commands of France. The day after the King's message to parliament was communicated to the French government, Bonaparte delivered to Lord Whitworth a paper (a copy of which I have seen) stating:

1. That the expedition preparing in the Dutch ports was, as all the world knew, destined for America; but, in consequence of the message it had been recalled and would not proceed.

2. That if the armament, announced in the message, be not satisfactorily explained, or, if it take place, France would march twenty thousand men into Holland.

3. That the forces debarked in the ports of Holland would be reinforced and assembled on the coast of Flanders.

4. That the French army would be immediately put on a war establishment.

5. That camps would be formed on the coast between Dunkirk and Boulogne.

6. That an army would enter Switzerland.

7. That an army would march into Italy, and occupy Tarento, and,

8. That England must not expect, under cover of an armament, to avoid the execution of the treaty of Amiens.

The greatest activity continues to prevail in the military and naval departments. It is understood that the squadrons in the East and West Indies, and in the Mediterranean, will not immediately require reinforcement; and that a respectable fleet will soon appear in the channel and on the coast of Ireland. The regular army, on foot in Great Britain (exclusive of the forces in Ireland, Egypt, Malta, Gibraltar and the colonies), consists of twenty-seven thousand infantry and twelve thousand cavalry, and will be reinforced immediately by thirty-seven thousand of the militia, which have been called out.

In Mr. King's dispatch to Secretary Madison, dated London, April 2, 1803, printed on page 551 of the same volume, he said: "In a late conversation with Mr. Addington he observed to me, if the war happen, it would perhaps be one of their first steps to occupy New Orleans."

In Minister Livingston's dispatch, of April 11, 1803, to ecretary Madison, he said (same volume, page 552):

M. Talleyrand asked me, this day, when pressing the subject, whether e wished to have the whole of Louisiana. I told him no: that our shes extended only to New Orleans and the Floridas; that the policy France, however, should dictate (as I had shown in an official note) give us the country above the river Arkansas, in order to place a rrier between them and Canada. He said that, if they gave New leans, the rest would be of little value, and that he would wish to ow "what we would give for the whole."

The treaty was signed April 30, 1803. The king of ngland eighteen days afterwards declared war against rance. And if Bonaparte had not sold Louisiana to the nited States, "for a song," he would have incurred the miliation of seeing that province pass under the British g; and British provinces and British ships would now rround what little would remain of the United States. 14. The counsel for the appellants contended that the octaws and Chickasaws could not have placed a high imate upon the leased district, because they leased it the Confederate States for nothing, in 1861. But the octaws and Chickasaws, in the treaty of 1861, merely ewed, in favor of the Confederate States, the lease ich they had given to the United States, in the treaty 1855. One government was substituted for the other. e Confederate States took the lease as it stood in the nds of the United States. The condition to settle In- ns on the land was expressly continued. If any money sideration had been paid, for the lease, by the United tes, it enured to the benefit of the Confederate States. e following is the language of the Confederate treaty of 1:

rt. II. The lease made to the United States, by the treaty of 22d day une, 1855, by the Choctaw and Chickasaw nations, of all that portion eir common territory which lies west of the ninety-eighth parallel est longitude, is hereby renewed to the Confederate States, but for term of ninety-nine years only from the date of this treaty.

The Choctaws and Chickasaws had expected no further

compensation for the lease, from the United States, provided the land should be devoted to Indian settlement. By the terms of the Confederate lease, it was expressly devoted to Indian settlement. But, in articles 53 to 57, inclusive, the Confederate government agreed to pay the Choctaws and Chickasaws moneys amounting, in the aggregate, to $3,124,947.98. The consideration for this payment is not expressly indicated in the treaty. That the lease entered into that consideration would seem to be very clear. I submit to the court an official publication containing this treaty, and respectfully request the court to examine articles 11, 53, 54, 55, 56, and 57.

The claims of the Wichita and affiliated bands of Indians.

The following extracts from the brief filed by the Wichita and affiliated bands in the court below, show the basis, nature, and scope of their claims:

The Wichita tribe has occupied the country immediately west of the Cross Timbers from a time when "the memory of man runneth not to the contrary," and the traditions of the Indian tribes as well. Page 14.

The Wichita tribe have occupied the country west of the Cross Timbers from time immemorial. Page 19.

So far as we have established the confines of the territory occupied by the Wichitas and their close affiliates, so far do we claim title by the right of occupancy. Those confines we claim are established and admitted by the treaty of 1835 to be: "The Great Prairie west of the Cross Timbers to the western limits of the United States." Page 37.

On the same points we claim as follows: (1) That by a residence from time immemorial the Wichitas acquired a title by occupancy of the Great Prairie west of the Cross Timbers. Page 132.

Answering the summary contained on page 102 of the Chickasaw brief, we again disclaim any attempt to fix the Wichita habitat in the leased district. This is a creature of the Chickasaw fancy, fathered by a wish to restrict the Wichitas, originally, to so limited an area. Page 149.

Continual occupancy of the country west of the Cross Timbers, of which the leased district forms a part, is conclusively shown by all history and the traditions of all neighboring Indian tribes. Page 153.

This title is easily established by history, as it requires no tradition to fill in the gaps. But first let us again reiterate our statement that our claim is not as to the leased district, but as to the Great Prairie west of the Cross Timbers. Page 185.

The following table exhibits the area of land embraced in each of these different claims.

Wichita Reservation	743,610	acres.
1,060 Wichitas and affiliated Indians, each 160 acres. Aggregate	169,600	"
Surplus after allotment	574,010	"
Leased District	7,713,239	"
Each Wichita	44,075	"
Each member of the Wichita and Affiliated Bands	7,276	"
Land west of Cross Timbers, between Red and Canadian rivers, to U. S. boundary	18,114,519	"
Each Wichita	103,510	"
Each member of the Wichita and Affiliated Bands	17,088	"
Land north of Red river and west of Cross Timbers, to 100th meridian	16,128,000	"
Each Wichita	92,160	"
Each member of the Wichita and Affiliated Bands	15,215	"
Land north of Red river and west of Cross Timbers, to U. S. boundary	34,560,000	"
Each Wichita	197,485	"
Each member of the Wichita and Affiliated Bands	32,604	"
Lands west of Cross Timbers north and south of Red river, to 100th meridian	26,880,000	"
Each Wichita	153,600	"
Each member of the Wichita and Affiliated Bands	25,538	"

Land west of Cross Timbers north and south of Red river, to U. S. boundary,	57,600,000 acres.
Each Wichita.....	329,148 "
Each member of the Wichita and Affiliated Bands.....	54,339 "

It will appear that the names Wichita, Witchita, Towiache, Toweash, Toyash, Towish, Taoviase, Taouayache, Tahawayase, Ouichita, Ouachita, Ouasita, Ousita, Wachita, Washetaw, and Panis Piques, have all been applied to the same tribe or band.

The grounds, on which the counsel for the Wichita and affiliated bands base their claim of title, not only to the Wichita reservation, but also to the entire leased district, and the whole of the Great Prairie west of the Cross Timbers, stated in their own words, are:

(1) That by a residence, from time immemorial, the Wichitas acquired a title, by occupancy, to the Great Prairie, west of the Cross Timbers;
(2) That the treaty of 1835 admitted that occupancy, and we claim that that occupancy was such as to support the usual Indian title:
(3) That, by the agreement of Fort Arbuckle, the Wichitas admitted the affiliated bands, to an interest in their title, with the approval of the United States.

The Wichitas' "title, by occupancy," to the entire leased district, and to the whole of the Great Prairie west of the Cross Timbers and north of Red river, is identical, in character, with their title, by occupancy, to the Wichita reservation. The Wichitas, including men, women and children, number 175. If they hold an aboriginal title, by occupancy, to the Wichita reservation, each man, woman and child is invested with a title, by occupancy, to an equal undivided share, not only in that reservation, but also in the leased district, and in the Great Prairie. Each share in the Wichita reservation will amount to 4,240 acres; each share in the leased district to 44,053

acres; and each share in the Great Prairie to 197,485 acres.

It becomes important to ascertain the nature of this Indian title, by occupancy, to lands in the United States. Its nature has been fixed by the concurrent action of the European powers, approved and ratified by the United States. In 1685 France, by the right of discovery, became the owner, in fee simple, of the province of Louisiana, extending from the Mississippi river, westward, to the Rio Bravo del Norte and the Rocky mountains, and from the Gulf of Mexico, northward, beyond the 40th parallel of north latitude. The title of France was subject to such Indian rights of occupancy as then existed. In 1762 France ceded the province to Spain and in 1800 Spain retroceded it to France. While it was held by France and Spain small parts of the province were granted to private persons. With the exception of those grants, every acre of Louisiana became the estate, in fee simple, of the United States, when Bonaparte ceded the province to the United States, in 1803. But the title of the United States, so acquired, was subject to such Indian rights of occupancy as then existed.

These rights of occupancy did not enter into the texture of the title, but only hung as incumbrances upon it. They were extinguishable either by cessions from the Indians, or by their removal from the land, or by the exercise of the right of eminent domain by the United States. If any part of Louisiana was unoccupied in 1803, the fee-simple title acquired by the United States to that part of the province was not encumbered by any Indian right of occupancy. And it is evident that it was not competent for any Indian tribe, by entry upon land in the province, after its cession to the United States, to acquire a title by occupancy thereto, which would in any way encumber the

title of the United States. It is evident that no Indian right of occupancy, subsequent in origin, to 1803, could impair the absolute ownership of the United States. It is also evident that, in order to constitute an aboriginal title, the Indian occupancy must have been practically continuous. A tribe could not, by pitching their wigwams *temporarily*, in different localities, acquire an occupancy, in all or any such localities.

The Wichitas never held any title by occupancy to the Great Prairie, or to the leased district, or to the so-called Wichita reservation. There is no evidence that the Wichitas were ever located, even temporarily, either on the Wichita reservation, or in the leased district, or on the Great Prairie, prior to 1820. An alleged Indian tradition that, in their wanderings, they once made a short halt in the leased district will be hereafter considered. The appellees' proofs show that they were located in Texas, sometimes on the Brazos, sometimes on the Colorado, sometimes on the Red river, and sometimes on the Wichita river, in 1682, 1759, 1788, 1800, 1802, 1805, 1806, 1810, 1818, 1830, 1836, 1837, 1839, 1841, 1846, 1847, 1848, 1849, 1850, 1856, 1857 and 1858; and that they were located in Louisiana in 1688, 1690, 1699, 1703, 1715, 1720, 1722, 1761 and 1802. The appellees' proofs also locate, in different years from 1700 to 1815, twenty-two other tribes of Indians, but no Wichitas, between the Red and Arkansas rivers, on the lands to which the Wichitas claim a title by occupancy.

I submit that the evidence, which we have presented, has completely demolished the "aboriginal title," claimed by the Wichita and affiliated bands. I submit that it has overwhelmed both their proofs and their arguments. The most diligent and careful scrutiny of those proofs and arguments will disclose no basis, for their claim of

"aboriginal title," beyond the evidence referred to, in their sixth request for findings of fact, which takes the following form:

6. In 1818, and prior thereto, the Wichita tribe of Indians occupied the country north of Red river, and around the Wichita mountains. Prior to 1810, they occupied two villages, one on each side of Red river, just west of Cross Timbers.

To establish these alleged facts, the counsel cite six different documents, as follows: Parilla Expedition, 1759; Mesieres Expedition, 1778; Fragoso Expedition, 1788; Report of Dr. Sibley, 1805; Robin's work, Paris, 1807; Indian Statements, 1883. These documents, which constitute the only evidence presented in proof of the facts so alleged, actually and completely disprove those alleged facts. In August, 1759, Parilla, a Spanish officer, marched, with a force of Spaniards and Apaches, from Bexar, in the southwest part of Texas, on a military expedition towards the Red river. He invaded territory, which was then the property of France, but was, three years afterwards, ceded by France to Spain. Having marched 150 leagues, in a northeasterly direction, he surprised a ranch, killed 55 persons and took many captives. The Spaniards and Apaches then advanced towards the Wichita villages. But, in the region of San Teodoro, subsequently so called, they encountered 6,000 Indians, of different tribes, under a French flag, in a strongly fortified position. Not waiting to be attacked, the Indians sallied forth and routed Parilla's troops, who fled in a panic.

That defeat ended the expedition. Parilla did not reach any Wichita village. He does not say that the army, which put him to flight, contained any Wichitas. The counsel for the Wichitas aver that

Parilla had no personal knowledge of the towns, and nothing, in the record of his trip, shows that the Wichitas were differently situated than when they were visited, by Mesieres, nineteen years later.

And certainly it is possible that the Wichitas had returned in 1778 to the locality where they were in 1759. For Parilla's defeat is said to have occurred "in the region of what was subsequently called San Teodoro;" and Mesieres states that, in 1778, he named a Wichita village "San Teodoro." But if this conjecture of the Wichita counsel, respecting the locality of Parilla' defeat, is well founded, the Wichitas were located, in 1759, more than 45 miles east of the 98th meridian, which constituted the eastern boundary of the leased district. Parilla's narrative, then, actually proves that the Wichitas were not in the leased district, or within 75 miles of the Wichita reservation at that time; and it tends also to prove that they were then more than 45 miles east of the meridian, which constituted the eastern boundary of that district, and, therefore, would not have been in the leased district, even if they had been north of Red river.

The statement, respecting Parilla's expedition, is taken from volume 5 of Hubert H. Bancroft's work, quoted on page 733 of the record, in United States *v.* Texas, as follows:

> A conference of officers, at Bexar, in January, 1759, made plans for the campaign. * The army of five hundred soldiers and volunteers, with a large force of Apache auxiliaries, in the best of spirits, started in August, under the command of Parilla. After marching some hundred and fifty leagues they surprised a rancheria, killing fifty-five of the foe and making many captives. They then advanced against the towns of the *Taovaiases*, and, in the region of what was later called San Teodoro, found six thousand Indians of different tribes, in a strongly fortified position, many of them armed with muskets, and displaying a French flag. * The savages did not wait to be attacked, but made a sortie in force and the Spaniards fled in a panic. [illegible] 5.

The report of the Spanish Lieutenant-Colonel de Mesieres, dated April 18, 1778, printed on pages 890, 891, of the record in United States *v.* Texas, shows the following facts:

This officer, having started from Bexar, reached Bu-

carely, on the Trinity river, March 9, 1778. He started from Bucarely March 18, 1778, and reached the Tuacane settlement, on the Brazos river, April 5, 1778. He left that settlement April 8, and reached the *Taovíase* village, on the Red river, April 15. He proceeded no further, but returned from the *Taovíase* village to Bucarely, where he was on the 2d of May, 1778. He made no excursion north of the Red river. He does not state, or imply, that the *Taovíases* occupied a mile of land north of the river or within the leased district. He says:

From the Brazos river, on which the Tuacanas dwell, to the stream that waters the *Taovíase* village, there is seen, on the right, a forest justly called by the natives the "Big Forest" (Cross Timbers). It is very thick, although not very wide. The *Taovíase* nation is divided into two villages, one situated *north* of the Rio Bermejo (Red river) or River of Natchitoches, and the other opposite. * The *former* village is composed of *thirty-seven* houses and the *latter* of *one hundred and twenty-three* houses. They have fuel at hand in that big forest above mentioned, extending eighty leagues in length, and one, two, or more leagues, in width, where bear and wild hogs are found. The Rio Bermejo runs from the mountains of New Mexico, at about four days' travel from the *Taovíase*, and forms three forks which unite near the village. Doc. 203.

This statement shows that, in 1778, the Wichita village was divided by the Red river, more than three-fourths of the wigwams being on the south bank of the river. It also shows that this double village was located at the point, where the Cross Timbers, extending from the Brazos to the Red river, strike the latter river, and was therefore east of the ninety-eighth meridian, which constitutes the eastern boundary of the leased district. For the Cross Timbers reach the Red river near the point at which the 97th meridian crosses that river, as shown by the maps of Austin, 1830; Hunt and Randel, 1839; Kennedy, 1841; and Tanner, 1846. The proofs relating to the Parilla and De Mesieres expeditions, therefore, locate the Wichitas, prior to 1818, not on the Wichita reservation, nor even in the leased district, but about 45 or 50 miles east of the

98th meridian, which meridian bounds the leased district on the east.

Fragoso started eastward, from Santa Fe, on the 24th of June, 1788. According to his itinerary, he left the *Wichita* villages, July 26, and travelled that day 7 leagues. On the 27th he started at 6 o'clock A. M. and went into camp at 6 P. M. He probably travelled 10 or 11 hours; but he does not state the distance made. On the 28th, after travelling 4 leagues, he reached the *Cross Timbers*. The average hourly distance made during the 22 days prior to his arrival at the *Wichita* village, for which the distances are stated, was four-fifths of a mile. The distance from the *Wichita* village to the *Cross Timbers* was, therefore, about 14 leagues, or 42 miles.

Fragoso traversed the Cross Timbers at their intersection with the Trinity river. The shortest distance between that point and the intersection of the 98th meridian with Red river is more than 60 miles. The narrative of Fragoso, therefore, locates the Wichita villages east of the 98th meridian.

Dr. John Sibley's report to the secretary of war, dated April 5, 1805, and printed in the American State Papers, volume 1, Indian Affairs, pages 72 et seq., contains the following paragraphs:

PANIS OR TOWIACHES. The French call them *Panis*, and the Spaniards *Towiaches;* the latter is the proper Indian name. They live *on the south bank of the Red river*, by the course of the river upwards of eight hundred miles above Natchitoches, and by land, by the nearest path, is estimated at about three hundred and forty. They have two towns near together. The lower town where the chief lives, is called *Witcheta*, and the other is called *Towa-a-hach*.

From the mouth of this river (False Wachita), through the Prairie, to the main branch (Canadian) of the Arkensa, is three days' journey; perhaps sixty or seventy miles in a straight line. From this (mouth of the False Wachita) to the Panis or Towiache towns, by land, is about thirty miles, and by water double that distance. The river is nearly a mile wide. * * Appendix, 102.

This report shows that in 1805 the Wichitas lived not

h of the Red river but also not more than thirty land from the mouth of the False Wachita. The the False Wachita is about four miles west of lian of 96° 30′ as shown by the land office maps nd 1897 and by the Indian office map of 1896. g to Dr. Sibley, therefore, the Wichitas, or Towi- ere, not only south of the Red river, in 1805, but r 50 miles east of the 98th meridian.

ith of the authorities, on which the counsel rely, rk of Robin. He says, vol. 3, p. 3:

e *Natchitoches* to *Yatasses* the distance, reckoned by water, is leagues; from this savage village to that of the *Little Cadeaux*, d from there to the *Grand Cadeaux, fifty;* from the *Grand* the *Taouayaches*, who are located on the west bank of said he *Ouitcitas* on the east, the two villages being opposite each y (*quartre vingts*) leagues. Ascending the same river, we find, e of fifty leagues from these two villages, a rock of calcined serves to supply the natives of this region, who make com- t among themselves. This, with many other salt streams, waters of the Red river very brackish when it is low. Higher r continues large, but flat and fordable. Rec. 99.

ling to this statement, the distance from the ches (located near the present site of the city of e) to the villages of the Taouayaches and Ouitcitas vater, 185 leagues,—about 555 miles. The dis- om Natchitoches, to the sharp bend of the Red the state of Arkansas, is, in a straight line, 132 The distance, in a right line, from that bend to meridian, is 181 miles. If the distance, by this oked river, from the Natchitoches to the sharp the Red river, and from that bend to the 97th was three-fourths greater than the distance, by lines connecting those three points, the whole by water, from the Natchitoches to the 97th was about 548 miles, that is to say, only a few than Robin's estimated distance from the Nat- to the villages of the Taouyaches and Ouitcitas.

Dr. Sibley and M. Robin, therefore, agree very closely in the location of these villages many miles east of the 98th meridian.

The sixth and last item of proofs, on which the counsel rely, to establish their claim that the Wichitas occupied the Wichita reservation, prior to 1810 or 1818, embraces "Indian Statements, 1883." These statements were made by Es-quetch-chee, Niastor and Uts-tuts-kins. On page 32 of Senate Executive Document, No. 13, 48th Congress, 1st Session, appears the following:

ES-QUETCH-CHEE, Witchita (Old Man), says:

He is about 85 years of age; was born on Red river not far from the mouth of the Big Wichita. When I was a boy the chief of the Wichitas was killed, and after that my people moved into the Wichita mountains, and had many villages. When I became a man I moved with some of my people to Rush springs, east of where Fort Sill is now, where we made farms and had everything plenty; never wanted for anything. We lived there a great many years, quiet and peaceable, until soldiers came there in search of Comanches who were camped near our village, buying corn and watermelons from us, and who had before coming to our village committed depredations on the frontier of Texas. (x [illegible], 125.)

He states further, that when the Wichitas left Rush creek, they moved to Caddo creek (which was not in the leased district) and thence to Arbuckle (which was not in the leased districts). If his statement is to be admitted in evidence, and is correct, the Wichitas resided in Texas until after their chief was killed, and at some time (not specified) after his death, moved to the Wichita mountains; when Esquetchee became a man they moved to Rush Springs, which was not in the leased district. They may have remained in the Wichita mountains five or six years. They remained at Rush Springs many years, and then moved to Fort Arbuckle, which was not in the leased district. If this proved, as it does not, that the Wichitas went to the Wichita mountains, before 1818, it would also prove that they remained there only a few years.

The next witness presented by the Wichitas is Uts-tuts-kins. They say that they had horses in the 17th century.

and that Uts-tuts-kins testified that they had resided in the leased district ever since they had horses. And yet the fact is that the deposition of Uts-tuts-kins, which is printed on page 36 of Senate Executive Document, No. 13, 48th congress, 1st session, is flatly contradictory to this assertion. Uts-tuts-kins says that the Wichitas, long ago, came from a far-off country; that they came south, and met the Comanches, who had horses; that then, for the first time, the Wichitas obtained horses; that they moved to Neosho, in Kansas; that they moved thence to the Salt Fork (which was north of the leased district); that they moved thence to the Red Hills (which were north of the leased district); that they went from the Red Hills to the mouth of Otter creek, and separated into three parties, one locating at the mouth of the Wichita (which was in Texas), another locating on the Clear Fork of the Brazos (which was in Texas), and the third locating at the mouth of Otter creek, which was in the southern part of the leased district; that the chief of the Otter creek party having died, that party moved to the mouth of the Wichita (in Texas), and joined the party located there; that the chief of the Brazos party having died, that party joined the other two, at the mouth of the Wichita (in Texas), and all were together again, and lived there a long time; that they moved thence to the mouth of Cache creek; thence to the mouth of Otter creek, where Col. Dodge visited them in 1834; thence to Fort Sill; thence to Rush Springs, which was not in the leased district; thence, in 1858, to Caddo creek, which was near Fort Arbuckle, and was not in the leased district.

The last of these three witnesses is Niastor, whose statements will be found on pages 30, 31, 51, 52, of the same executive document. The counsel for the Wichitas aver, on page 24 of their answer to our petition, that the

Towaconies, and certain other tribes, "have, from time immemorial, resided in Texas, north and east of the Brazos river." In support of their contention, that the Wichitas have, from time immemorial, resided in the leased district, they produced a statement alleged to have been made by Niastor, a chief of the Towaconies. I copy from pages 30, 51, 52, of Senate Executive Document, No. 13, 48th Congress, 1st Session, as follows:

Niastor, chief of the Towaconies, says:

He remembers well, when he was a boy living with his people, on the Brazos river, in Texas, that Major Nabors convened a council of Indians there, and told them that they were to possess that country for a home; that it would not be taken away from them. * * It was not long after this, when Major Nabors told us, if we would consent to give up our homes, on the Brazos, that we should be given a larger country on the north side of Red river. * *

Our people, after crossing Red river, traveled north, until they met their friends, the Wichitas, on the south side of the Wichita river, near where the commissary building now stands; the Wichitas having come up from near Arbuckle. After arriving here, we were shown the country we were to have for our homes, and were told that, with the Wichitas, we should possess it forever. Page 30.

Niastor. My mother told me that her father said she was born in this country, and that he was born on the Arkansas river, below where the town of Wichita now is. * * My great-grandfather told my mother, that, when the Wichitas lived on the Arkansas river, the Indians, from the north and east, crowded them, and fought them, and drove them this way. That, at that time, To-de-kits-a-die (meaning Boy Chief) was the chief the Wichitas. He told my mother that our people had always lived there; but, after the Indians fought them, our people held a council and concluded to move away from there. Some of our people were selected, to go and look out a country; and they went southwest until they saw the mountains, (now called Wichita mountains) and liked the country very much; they returned to the village; and then our chief men called a council, and heard what the returned party said about the land they had seen; that it pleased them, and that they wanted all of our people to go there. At that time there were a great many Wichitas, and *our* people had never seen any horses, there being none in the country, and when our people left the village, on the Arkansas river, to go south, they all had to walk. When they arrived at the North Canadian, they traveled up that river, till they came to the red sand hills, in the bend of the river, where they made villages and raised corn. * * Our people, after living there some time, raising corn, got tired and the boy chief To-de-kits-a die told them that they would all go to the Wichita mountains, which was a better country for raising corn than the red hills. Pages 51, 52. Appendix, 134.

Niastor says that his mother told him, that her father told her, that he (her father) was born on the Arkansas

river, in Kansas, below the site of the town of Wichita; that his mother also told him, that his great-grandfather told her, that the Wichitas (whom he mixes up with the Towaconies) had always lived there, that they moved thence to the Sand Hills, which were north of the leased district, and, after some years, moved to the Wichita mountains. It is obvious that Niastor, who was born in 1835, and lived on the Brazos river, in Texas, until 1859, with his tribe the Towaconies, (who, according to the Wichita answer, p. 94, had resided in Texas from time immemorial) could not have acquired, otherwise than by hearsay, any knowledge of the early movements of the Wichitas.

In order to establish an aboriginal title, to the Wichita reservation, so called, or to the leased district, of substance and consistency sufficient, either to overcome the title acquired by the Choctaws and Chickasaws, under the treaty of 1820, or to entitle the Wichitas to any compensation for the land, the Wichitas must show an occupancy of that reservation prior, not only to 1820, but also to 1803. But they have not produced even a shred of evidence, to prove that a single Wichita, or a single member of either of the "Affiliated Bands," ever set foot within the Wichita reservation, prior to 1820, except the story of Niastor, the Towacony, that his mother told him, that his great-grandfather told her, that the Wichitas, on their way, from Kansas to the red Sand Hills, which were not in the Wichita reservation, and thence to the Wichita mountains, which were not in the Wichita reservation, stopped, for a short time, on Sugar Creek, which was in that reservation.

But if this story of Niastor's mother were absolutely true and were competent evidence, it would not establish, for the Wichitas, any aboriginal title to the reservation. On the contrary, it would absolutely destroy the title which

they claim. For the story of Niastor's mother shows that the Wichitas had not lived at Sugar Creek from time immemorial,—that they had always lived in Kansas, but had tarried, for a time, at Sugar Creek, in their wanderings from Neosho.

The version given to this tradition, by Uts-tuts-kins has already been set forth. Es-quetch-ee does not allude to it. Nothing was said by Es-quetch-ee, or Uts-tuts-kins, even tending to show that a Wichita was ever on the Wichita reservation, prior to 1859. Not one of the other five items of proof, upon which the counsel rely, proves, or tends to prove, that a Wichita ever saw the Wichita reservation, or even the leased district, prior to 1820. On the contrary, they all locate the Wichitas in Texas. The narrative of De Mesieres' expedition does, indeed, locate a few (37) of the Wichita wigwams, on the north bank of the Red river; but it locates them at the Cross Timbers, many miles east of the 98th meridian. No proof has been produced to show that any Wichitas ever occupied any part of the leased district, *prior to* 1859, otherwise than as a temporary stopping place, in their ceaseless wanderings.

The appellants lean heavily on Albert Pike. In his letter to the secretary of the interior, dated July 12, 1882, and printed on pages 29 and 30 of Senate Executive Document No. 13, 48th Congress, 1st Session, General Pike says:

> In 1861, as commissioner of the Confederate States, I made a treaty with the reserve Comanches (of the Peneteka band of the Ni-um) and the other small tribes, then settled in the vicinity of the Wichita agency and Fort Cobb. Among these were the Wichitas. * * The Wichitas, or Ta-wai-hash, preferred a claim to me, for compensation for the country south of the Wichita mountains, on Cache and Clear Creeks, which they had for so many years possessed and occupied, without conflicting claims on the part of any other tribe. No memory of man reached back to the time when they had not occupied it. * * and the treaty agreed that their claim, for compensation, should be considered and examined, and that, what might be found just and right, should be paid them.

According to this statement of General Pike, the Wichitas, in 1861, claimed "*compensation for the country south of the Wichita Mountains on Cache and Clear Creeks;*" and, as commissioner of the Confederate States, he agreed that this claim should be "considered and examined, and that, what might be found just and right, should be paid them." This "country" is a small tract, not in the Wichita reservation, but in the southern part of the Kiowa and Comanche reservation. The Wichita claim has both grown and changed since it started on its travels. In 1861 it covered only a small tract, in the southern part of the Comanche reservation. In 1882 it expressly excluded compensation for any part of the Kiowa and Comanche reservation, but included compensation for the residue of the leased district. The claim *now* covers, not only the Kiowa and Comanche reservation, but also the entire leased district, and, in addition, many millions of acres bordering on that district.

The official communication of Commissioner Price, to the secretary of the interior, dated October 9, 1883, and printed on pages 2 to 12 of the "executive document" above mentioned, contains the following paragraphs:

In a communication, dated July 12, 1882, Joseph Leonard asked, as a reserve for the Wichitas and affiliated bands, all that part of the Indian Territory west of the 98th degree of west longitude and south of the Canadian river, *except the Kiowa and Comanche reservation.* * *

Luther H. Pike, *as counsel for Joseph Leonard*, alleged delegate, submitted a printed brief of thirty-one pages, in which the history and claims of this tribe are fully set forth.

It may be remarked that *Joseph Leonard has failed to furnish any evidence that he is authorized to represent these Indians, although repeatedly requested to do so.* Ex. Doc. 115.

General Pike commanded the Confederate military department, which included the Indian Territory. He was the Confederate commissioner, who negotiated the treaty of July 12, 1861, with the Choctaws and Chickasaws, and thereby secured for the Confederate army, those Choctaw

and Chickasaw recruits, whom the counsel for the appellants have so vigorously assailed. He was also the father of Luther H. Pike, the attorney of the unauthorized agent Leonard, and his (General Pike's) communication of July 12, 1882, cited above, was actually enclosed in Leonard's petition of that date. He had, of course, no personal knowledge of the alleged ancient occupancy of the Wichitas. Nor did he assert that the Wichitas occupied any part of the leased district, except the "country south of the Wichita mountains on Cache and Clear Creeks," in the Kiowa and Comanche reservation, which Leonard expressly excluded from the reserve which he asked for the Wichitas. Finally, the circumstances do not show that General Pike was a disinterested witness.

The claim of 175 Wichita men, women and children, to the aboriginal ownership of 7,713,239 acres of land, worth 40,000,000 of dollars, within the leased district, and of untold millions of acres contiguous to that district, is manifestly absurd. In order to improve its appearance by expanding the Wichita population, the counsel undertook to prove, by a picture "*after Catlin*," produced in evidence, and by a statement in "Catlin's Manners and Customs," that there were 600 Wichita wigwams, containing according to their estimate, (p. 45) about 6,000 Wichitas, at the mouth of Otter Creek, in 1834. But the fact is that Mr. Catlin never saw one of these wigwams or witnessed a single fact relating thereto. He never was at, or near, the mouth of Otter Creek. He became seriously ill before Colonel Dodge's expedition reached the mouth of Otter Creek, and was left at the "Sick Camp," about 50 miles from the mouth of that creek. The picture was made by "Jo. Chadwick," a young man from St. Louis, who accompanied the soldiers, and Mr. Catlin's statement was based upon what the young man told him.

I copy from page 70 of "Catlin's North American Indians":

> The above letter, it will be seen, was written some time ago, and when all hands (save those who were too sick) were on the start for the Pawnee village. Amongst those exceptions was I, before the hour of starting had arrived; and, as the dragoons have made their visit there, and returned in a most jaded condition, and I have again got well enough to write, I will render some account of the excursion, which is from the pen and pencil of my friend Jo., who went with them and took my sketch and note books in his pocket.

The Wichitas claim to hold the leased district, by the same kind of title, by which the Choctaws and Chickasaws held their lands, in the state of Mississippi. They are mistaken. The Wichita title rests on what Niastor said, that his mother told him, that his grandfather and great-grandfather told her. This tradition is the sole basis of their "*aboriginal* title." But the boundaries of the Choctaw country, in Mississippi, were defined in the third article of the Choctaw treaty of January 3, 1786. 7 Stat. 21. Those of the Chickasaw country were defined in the third article of the Chickasaw treaty of January 10, 1786. 7 Stat. 24. They then occupied the very lands, which they sold to the United States, fifty years afterwards. In March, 1680, Hennepin found the Chickasaws where they were in 1786. Account of Hennepin's Discovery, 1 French Hist. Col. La., pp. 205, 206. Tonti found them in the same country, in October, 1681. Memoir of de Tonti, Id. p. 60. Du Pratz published his history, in Paris, in 1758. On pages 410, 411, of volume 2, he says:

> We had a war with the Tchicachas. We sent against them the Chatkas, our allies, to the number of 3,000.

He gives an account of the battle, which proved disastrous to the Choctaws. At page 138, he inserts his map, on which the Choctaws and Chickasaws are located where they were in 1786. In December, 1682, La Salle found

the Chickasaws in the same locality. 1 Margry, 551, 55
Adair's history (London, 1775) and his map, both, locat
the Choctaws and Chickasaws where they were in 178
This title of the Choctaws and Chickasaws, to their land
in Mississippi, is based not on tradition like that of th
Wichitas, to the leased district, which, even if true
would destroy their title, but on authentic history, which
carries it back more than 200 years.

The evidence introduced by the Wichitas, then, wholly fails to prove such an occupancy, either of the Wichita reservation, or of the leased district, as could support an aboriginal title. But these six items of proof, just considered, are not the only obstacles that confront the Wichitas. The proofs submitted by the appellees conclusively show that, before 1859, the Wichitas never occupied, except temporarily, and at long intervals, any part of the leased district.

I will now present the substance of the evidence which we have introduced in disproof of the claims of the Wichita and affiliated bands. The documents will be cited in their numerical order.

Evidence in disproof of Wichita title.

1. No. 1 will be considered hereafter.

2. Lieutenant Beach testifies to the following facts:

Melish's map of 1818 shows a "Panee" village upon Red river, *just west of the 96th meridian.* Darby shows a "Panis" village upon the Red river, *at about* 97° 31' *west longitude.* Pike shows "Pawnee hunting ground" at about 103° west longitude. Disturnell shows "Pawnies" upon Red river, at two places *between* 93° *and* 97° *west longitude.* Humboldt shows the "Tauaizes" between 102° and 103° west longitude. The De Cordova map

shows the "Towash" on the Brazos. Disturnell shows the "Toyask" on the Red river, east of the 97th meridian.

Not one of these localities is within the "leased district."

Nos. 3 and 4 have already been considered.

No. 5. In 1834, fifty-six years after De Mesieres visited the *Taovaiase* village, and 75 years after Parilla's defeat, Colonel Henry Dodge, of the United States dragoons, marched, with his regiment, from Fort Gibson to a village, which he calls the "*Toyash* village." The journal of this expedition contains the following statements, quoted on pages 853, 854, of the record in United States *v.* Texas:

July 15th. Comanches, Kiowas and the band called by us Pawnee Picts, but correctly termed the Toyash, are friends and to a certain extent allies. The Comanches are, we learn, the largest band, the proudest and boldest: therefore the colonel has resolved to visit them first: thence to the Toyash village.

July 16th. * * The Comanche captains informed us that it is but a short distance to their camp. * * Two or three miles brought us in sight of their camp situated in a valley. * * The Comanches have hoisted an American flag over their camp. * * We are now in sight of a chain of peaks, so-called mountains, bearing south and west. Behind these are the Toyash villages. Some of these hills cannot be less than 2,000 feet above the prairie at their base.

July 19th. Marched for the Toyash village, twenty-three miles southwest. * *

July 20th. The command moved. * * West * * thirty-seven miles; road literally of granite rock for miles. We encamped five miles from the Toyash village, which is situated on a branch of the Red river. Width of the branch of Red river about five hundred feet from bank to bank.

July 21st. The command marched for the Toyash village: proceeded a mile or two, when we met about sixty Indians, who came out to meet us. * * We soon reached the village, which is situated immediately under mountains of granite some six hundred feet in height. In front of the village runs the river. * *

The point, at which Col. Dodge met the Toyash, or Wichitas, was on the North Fork, near the mouth of Otter Creek, about six miles, by land, from Red river. His narrative shows that, on his march to their village, he passed the Comanches, who constituted a very large tribe.

If it shows that the Wichitas were in the leased district, in 1834, it also shows that the Comanches were there at the same time. It does not show that any Wichitas were then within 50 miles of the Wichita reservation.

No. 6. On page 201 of Margry, volume 2, occurs the following statement of La Salle, *made in* 1682:

I have one of them (a boy), of the nation of the Pana, who live more than two hundred leagues westward, on one of the branches of the Mississippi, and inhabit there two villages near each other. Rec. 98.

If the distance of these villages from the Mississippi was 200 leagues *by land*, they were further west than the western limit of the leased district. If the distance was 200 leagues *by the course of the Red river*, they were east of the eastern boundary of the leased district.

No. 7. In Bernard, 188, Amsterdam, 1734, Tonti, under date of February, 1688, says:

When I arrived among the Taensas, the chiefs of that nation informed me of their quarrel with the Natchitoches on account of the salt, in which the latter would give them no share, and they prayed that I would intervene for their reconciliation. I willingly undertook this mediation. Thirty Taensas joined themselves to our company. We arrived, after a march of eight days, at the village of the *Natchitoches*. This nation makes but one people with two other nations, which are the *Ouasita* and the *Capicis*. These chiefs of three nations being assembled, I was made to take a seat in their midst. The thirty Taensas, before they took their places, asked permission to go to the temple to implore their God to aid them in securing a good peace. * * These conventions being made, they swear a mutual peace, and dance the Calumet. Then I took leave of them all. Rec. 94,

This shows that in 1688 the Wichitas resided in Louisiana, in the locality which is now the site of the town of Natchitoches.

Nos. 8 and 9. In La Harpe's journal, 6 Margry, 289, 292, under date of September 3, 1719, he says:

At gun-shot distance from their habitations, we crossed a beautiful rivulet enclosed by a thin wood, above which are the villages, situated on declivities along the southwest branch of the river of the Alkansas. These villages make only one, the houses joining themselves one to another, running from east to west, one league, in the most beautiful situation possible to be seen. The natives of these establishments are the Touacaras, Toayas, Caumaches, Aderos, *Ousitas*, Ascanis, Quataquois, Quicas-

quiris, Honechas. They can furnish six thousand persons of both sexes. The 8th, I caused all the principal chiefs of these nations to assemble, in order that I might be informed by them of the position of the river of the Alcansas, the nearest dwelling place of the Spaniards, the commerce which they carried on with the Padoucas. To which they answered me that their river formed two branches below their village; that the branch, upon which their dwellings were situated, extended towards the setting sun to villages of the Spaniards and Padoucas. Rec. 95, 96,

If this proves that the habitat of the Wichitas was within the leased district, in 1719, and that, therefore, they were the proprietors of the leased district, it also proves that the habitat of every other one of the tribes mentioned was within the leased district, and that each one of them was its owner. What it really proves, I submit, is that La Harpe met parts of these tribes temporarily encamped near the confluence of the Canadian with the Arkansas. This encampment must have been located either at the junction of the Canadian with the main stream of the Arkansas, in what is now the Cherokee nation, or at the confluence of the north and south forks of the Canadian, on the boundary between the Creek and Cherokee nations. There are no other points on the Canadian answering La Harpe's description. In either case the "Ousitas" were more than seventy-five miles from the nearest point of the leased district.

No. 10. The "History of Louisiana," by Du Pratz, published in Paris, in 1758, contains, at page 243 of volume 2, the following statement:

From the River Rouge to the Arkansas there *is no nation*. There *was* one on the Black river; this was the *Ouichitas* who had given their name to that river. Nothing remains at present of this nation, the Chickasaws having destroyed it in great part, and the remnant having retired amongst the Cadodaquioux, amongst whom the Chickasaws dare not disturb them. Rec. 97.

This shows that, prior to 1758, the Wichitas had resided on the Washita river, (to which they had given their name), within the district constituting the present state of Louisiana, and were driven thence, westward, by the Chickasaws, into the Caddo nation, which, as is elsewhere proven,

was located in northwestern Louisiana and northeastern Texas.

No. 11. Jeffrey's History, London, 1761, page 165, vol. 1.

About a hundred leagues from the place where this river falls into the *Mississippi* are the habitations of a vast nation called *Cadodaquiouz*, which extends, in different tribes, a vast way. They, as well as the people before mentioned, have a language peculiar to themselves; but that of the *Chickasaws* is understood among them all, like *lingua Franca*, in the Levant; they call it the vulgar tongue.

The *Ouachitas* are intermixed among them, having abandoned the Black river, to which they gave name, to avoid the rage of the *Chickasaws*, who dare not follow them; for the same reason the *Taensas*, who formerly inhabited this coast, near a river to which they lent their denomination, withdrew to the neighborhood of the *Mobileans*, where we before took notice of them. Rec. 98.

This corroborates the statement made in Du Pratz's History of Louisiana. The Washita of Louisiana was formerly named the Black river.

No. 15. In 1 Schoolcroft, 239, will be found the following statement, made August 20, 1847, by David G. Burnet, formerly president of the republic of Texas:

The Whacoes, Tawacanies, Toweash, Aynies, San Pedros, Nabaduchoes, Nacadochuts, and Hitchies are small tribes, or fragments of tribes, and separately considered, are quite insignificant. They have been long resident in Texas, and properly belong to it; but they are originally, the Hitchies excepted, of the Caddo stock, being offsets from that family. The Whacoes are the most considerable of these bands, amounting probably to 150 warriors, it being understood among Indians that every adult male is a warrior. They are a stealthy, thieving, faithless race, and have done much mischief, first and last, on our frontier. They live in a village on the Upper Brazos, and raise corn, beans, pumpkins, &c., and usually spend the winter months in hunting. The other small parties, amounting to about fifty families each, live in villages, on the waters of the Trinity and Neches, and cultivate the ground to a small extent.

The Hitchies, once a distinct and isolated tribe, have so intermarried with their neighbor bands that they have lost their identity, and may be considered merged into the common stock. The Caddoes formerly resided on Red river of Louisiana, above Natchitoches and below the Great Raft, and were included in the jurisdiction of the Indian agency stationed, in 1819, at Natchitoches. They removed to Texas a few years ago and now claim to be Texas Indians. Rec. 103.

This statement of Ex-President Burnet shows that the Wichitas (Toweash) were in Texas, in 1847, and "proper" belonged" to that republic.

No. 18. A narrative of the exploration of the Red river of Louisiana, in 1852, by Capt. Randolph B. Marcy, assisted by Lieut. George B. McClellan (Sen. Ex. Doc. No. 54, 32d Cong., 2d Sess.), contains the following statements:

The Wichitas are an insignificant tribe, in point of numbers, not having more than five hundred souls in the nation, and are not, of course, prepared to substantiate or enforce their title to this country; and indeed I very much doubt if they have any claims upon the consideration or generosity of our government, being the most notorious and inveterate horse thieves upon the borders. P. 69.

We reached the villages (which were situated upon the banks of Rush creek) and encamped about half a mile below them in the valley. * * There are two villages here occupied by the *Wichitas* and Wacos respectively. * * The village of the *Wichitas* has forty-two lodges, each containing two families of about ten persons. * * With the exception of a few families that live upon the Canadian, the whole *Wichita* nation is concentrated at this place; their numbers do not exceed five hundred souls. They have, during the early settlement of Texas, been more trouble to the people upon the northern border of that state than any other Indians. They have no regard for truth, will steal, and are wholly unworthy of the least confidence, and their vicious propensities are only kept in check now by force. * *

The particular district embracing the Wichita mountains has, for many years, been occupied and (with much justice, as it seems to me) claimed by the Wichita Indians, who have a tradition that their original progenitor issued from the rocks of these mountains, and that the Great Spirit gave him and his posterity the country in the vicinity for a heritage, and here they have continued to live and plant corn for a long time.

They have a large stock of horses and mules, many of which are the small Spanish breed, with the Mexican brand upon them, while others are large, well-formed animals, and have undoubtedly been stolen from the border white settlers. * *

This extensive belt of woodland (Cross Timbers), which forms one of the most prominent and anomalous features upon the face of the country, is from five to thirty miles wide, and extends from the Arkansas river, in a southwesterly direction, to the Brazos some four hundred miles. (88. 128.

Captain Marcy's journal indicates that in 1852 the Wichitas, excepting a few families, were located on Rush creek. This location was not in the leased district. He also states (of course not of his own personal knowledge) that the Wichitas, for many years prior to 1852, had occupied and claimed the district embracing the Wichita mountains.

No. 19. Kennedy's Texas, 1841, vol. 1, p. 349, contains the following:

In alliance with the Wacos were the Pawnee Picts, or Toweashes, residing on the Red river, sometimes on the side of the United States, and sometimes in Texas. Rec. 102.

No. 21. At page 72, of part 1, of French's Historical Collections of Louisiana, New York, 1846, appears the the following statement, in the English language, purporting to be a translation of Tonti's narrative:

We set off on the 12th, with 12 Taencas, and, after a voyage of twelve leagues to the N.W., we left our boat and made twenty leagues portage, and, on the 17th of February, 1790 (1788?) came to *Natchitoches*. They made us stay at the place, which is in the midst of the three villages called *Natchitoches*, *Ouasita* and *Capiché*. The chiefs of the three nations assembled, and before they began to speak, the 30 Taencas, who were with me, got up and, leaving their arms, went to the temple, to show how sincerely they wished to make a solid peace. Rec. 102.

From this statement it appears that in 1788, or 1790, the Wichitas resided within the district which now constitutes the state of Louisiana, in the vicinity of the present town of Natchitoches.

Nos. 24 to 39, inclusive, are tracings of maps locating the Wichitas, in different years, at different points outside the leased district.

No. 40. The report of Indian agent, dated "Special agency for Texas, on Purdanallas, near Fredericksburg, Oct. 6th, 1851," contains this statement:

The tribes and bands met here are Lapans, Comanches, Muscalaros, Apaches, Delawares, Cadoes, Toncaways, Wacoes, *Witchetaws*, and few wandering tribes. Rec.

It appears that, in 1851, the Wichitas were in Texas.

Nos. 41 to 65, inclusive, are tracings of maps locating the Wichitas outside the leased district.

No. 66. Moore's description of Texas, 1844, 2d ed., contains the following:

The principal tribes now residing within the limits of Texas are * * the Toweash. They live high up on the Colorado, above the San Saba. Rec. 102

This makes the Wichitas residents of Texas in 1844.

No. 67. In Martin's History of Louisiana, page 102, it is stated that in 1699,

Bienville and St. Denys returned to Biloxi. They had found the country, through which they intended to pass, entirely covered with water, and had proceeded to the village of the *Wachitas*, in which they found but five huts, the Indians having mostly removed to the *Natchitoches*. Rec. 127.

This statement imports that in 1699 the *Wichitas* were in Louisiana, near the *Natchitoches*, who are shown, by all the authorities, including ancient maps as well as narratives of travellers, to have resided near the place which is now the site of the city of Natchitoches in the state of Louisiana. The village of the *Wichitas* is located in that vicinity on the maps of the 17th and 18th centuries.

No. 68. Notes of Captain Marcy's Expedition of 1854, Philadelphia, 1856.

The surveying parties having concluded their labors, we struck tents this morning and marched to Fort Belknap, where we camped for a short time, to procure stores and prepare for future work, in locating and surveying lands for the Caddos, Ionies, Ah-nan-da-kas, To-wac-konies, Wichitas, and Tonkah-was, who exist in this neighborhood. * *

We arrived at Fort Belknap on the seventh (September, 1854). At a council, held here, the Ionies and Ah-nan-dah-kas were represented by Jose Maria, the Caddos by Tinah, the Wichitas and Wacos by O-che-ash and Ack-a-quash, and the To-wac-ko-nies by Utsiocks. * *

The Indians, who exist in the vast regions of the far southwest, are the Comanches, * * Wichitas, * * and Navajoes, all nomadic, and the * * Shawnees and Delawares who live in permanent houses.

As far as could be ascertained, there are 80 Wichita men, 112 women and 122 children. They are most arrant horse thieves and scoundrels, and have given more trouble to the settlers in Texas than any other tribe.

They have a village up on Rush creek, a tributary to the Washita, a kind of rendezvous for them, from which they make constant marauding expeditions.

Fort Belknap, one of the most distant posts on this frontier, is situated about a mile from the Brazos. Pages 212, 213, 228. Rec. 124.

This document shows that in 1854 the Wichitas resided in the "neighborhood" of Fort Belknap, which was situated about a mile from the Brazos river in the state of Texas; that they had on Rush creek, *east of the leased district*, a rendezvous from which they made constant marauding expeditions.

No. 72. Statement of A. J. Raines, March 11, 1836.

Hon. LEWIS CASS,
Secretary of War.

For the last five years, I have had much communication with the Comanche Indians and their allies. They inhabit the country from latitude 33°, on Red river, to the Rio del Norte, extending north to the road that leads from Saint Louis to S'ta Fe, south to the headwaters of Trinity, Guadaloupe, Brazos and Colorado rivers of Texas. * * The different tribes are Comanche, Kyawas, Towash or Southern Pawnees, Cados, Wacos, and Skiddies. * * Depredating upon the Mexicans of the interior states, ravaging their towns, carrying off large numbers of horses and mules, murdering their people and taking prisoners and converting them into servants, naturally prompts these wandering hordes to look upon themselves as the most powerful of nations * *

They have, from time to time, murdered more than fifty of our people, on the road from St. Louis to S'ta Fe, and on the frontiers of Arkansas; and as Arkansas appears to be the place (and I hope a permanent home) for our friendly Indians, it is desirable, on their account also, that we cultivate a good understanding with these land pirates of the great west. Ex. Doc. 93.

This statement shows that in 1836 several Indian tribes, including the Wichitas, roamed over the country between the headwaters of the Texas rivers,—the Trinity, Guadaloupe, Brazos and Colorado,—and the road from St. Louis to Santa Fe, stealing, murdering and taking prisoners.

No. 73. Report of Captain J. Brown, Little Rock, July 18th, 1837. Having named the Choctaws, Cherokees, Creeks, Seminoles, Senecas, Shawnees, Quapaws and Osages, he says:

The foregoing comprise all the tribes of Indians residing within the Acting Superintendency of the Southwestern Territory. Ex. Doc. 246.

This superintendency included the country between the Arkansas and Red rivers, extending westward to the one hundredth meridian of longitude, but did not include the state of Texas. Capt. Brown's statement shows that in 1837 the *Wichitas* did not *reside* in the leased district.

No. 74. Report of Indian agent, Chickasaw agency, May 27, 1844. He says:

I have just heard that the two boys, that were missing from Trinity river, in the republic of Texas, about the last of February, or first of March, ult., (at the time that their father, mother, and two children were murdered, in the most shocking manner, the lady had her limbs cut off

at her body) are now among the Wichitaw Indians, who live north of Red river, and south of the False Washita, and are within the Chickasaw district of the Choctaw nation. * *

You will please excuse me for giving you my opinion of what ought to be done. It is this: that some discreet person should be sent there, with a tolerably strong command, and induce those Indians to give up the prisoners, and also the Indians who committed the murder, and let them know distinctly that they will not be permitted to live in this country and go into Texas (a republic that we are on the most friendly terms with) and commit murder, and then fly into this for protection.

This report bears the following indorsement by the commissioner of Indian affairs:

Respectfully referred to the secretary of war. The outrage was committed on Texan citizens, but by wild Indians who are as much inhabitants of that republic as of our territory. The murderers should be delivered up to Texas and the lads liberated; and as they are now within our limits the matter is respectfully submitted.

No. 101. Report of Indian agent, Torry's Trading House, July 9, 1849.

The Wacos, Tahwocarros, Keechies and Wichitas have been perfectly quiet for some time past. They are making corn on the Brazos.

This shows that the Wichitas were in Texas, during the planting season, in 1849.

No. 102. Report of Indian agent, Chickasaw agency, August 29, 1849.

The Witchetaws have been, for some time, living in the western part of the (Chickasaw) district, and the Chickasaws would be very much pleased for them to move off. * * The Witchetaws and Caddoes have had some difficulties this spring. The Witchetaws stole several horses from the Caddoes; and the Caddoes went to the camp of the Wichetaws, and requested them to give them up. The Witchetaws positively refused, and the Caddoes * * drove off a number of the Witchetaws' horses. The Witchetaws saw and followed them, and, after going a mile or two, the Caddoes were overtaken and fired on by the Witchetaws. The Caddoes returned the fire and, during the fight, the Caddoes lost two men killed and one wounded; the Witchetaws lost ten or twelve killed and wounded. * * The Keechies are also opposed to the Witchetaws. They say that the Witchetaws are continually committing depredations upon the citizens of Texas. * * These people I have no control over; but I thought it my duty to put a stop to their stealing and killing each other, if I could by counsel. If they were to fight for a month, I would have no means to put a stop to it.

No. 112. Report of Indian agent, San Antonio, November 2, 1853.

I have the honor to enclose a report by special agent Hill, in answer to your communication enclosing to Jesse Stem, reports, &c., in regard to the Wacos and Wachita Indians, which I would commend to your consideration. These Indians left Texas, immediately after that difficulty, and have not returned since. Our frontier has consequently been relieved from the worst and most thieving bands of Indians now in the United States, and the beneficial results to the frontier citizens of Texas, since they were attacked by Maj. Sibley, is clearly perceptible. • • I do not approve paying for the property taken from them, from the fact that they are notorious thieves, and had no property but what they had stolen from some one else; and in that attack they have been taught a lesson that has so far proved beneficial; and now, to give them indemnity, will only encourage them to commence their old practices.

No. 113. Report of Indian agent, San Antonio, Texas, September 16, 1854.

There now reside on our border, in the Choctaw and Chickasaw reserve, the Wichitas, Wacoes, Tah-waccones, Keechies, and small bands of Ionies and a considerable band of Kickapoos. They have from time to time, crossed into Texas, and have, during the year, stolen large numbers of horses and committed other serious depredations on our citizens.

No. 114. Report of Indian agent, Fort Belknap, Texas, September 20, 1854.

The Wichitas I have not met during the year; in fact they may be considered in a state of open hostility with our people on this portion of the frontier. They commit depredations, by stealing horses, from time to time, as opportunities offer and prospects of escape will justify.

No. 115. Report of commissioner of Indian affairs for 1856.

The flattering success in Texas gives promise that, by a similar policy, the southern Comanches, Wichitas and other wandering bands may be successfully colonized on the western end of the Choctaw country.

This report shows that in 1856 the Wichitas were nomads, whom it was desirable to colonize within the leased district.

No. 116. Report of Indian agent, Brazos agency, Texas, December 27, 1856.

On the 26th inst. we were visited by ten camps of Wichita Indians, who came in for the purpose of expressing their sincere friendship for the Indians of the reserve. They show a strong desire to settle here and come under the rules and regulations of this agency.

This report shows that the Wichitas, in 1856, preferred a home in Texas to a home in the leased district.

No. 117. Report of Indian agent, March 6, 1857.

That country for a number of years has been a general rendezvous of horse thieves, viz: Witchitas, Keechies, Kickapoos and renegades from other tribes, who have carried on a very lucrative trade with Indians, and with white traders from the Creeks and Cherokees, and white traders from Arkansas, and a large portion of the horses stolen from Texas have been disposed of in this very territory. Ex. Doc. 73.

This report shows the purpose and character of the alleged "residence" of the Wichitas in the Wichita mountains.

No. 118. Report of Indian agent, Brazos agency, Texas, April 30, 1857.

It appears that the Wichitas are very destitute, having lost or eaten nearly all their horses. Some of them have, this spring, visited this agency, and have procured seed corn for planting, and, by the advice of spl. agent Ross, are now planting corn, at their village near the mouth of the Big Wichita. * * By the adoption of these suggestions, I feel confident that success will attend the efforts, proposed to be made, of at once colonizing the Wichitas and other Indians, and that our frontier will be soon relieved of the serious depredations that have heretofore interrupted its quiet. Ex. Doc. 262.

This report shows that in April, 1857, a part of the *Wichitas* resided and were planting corn, on the Big Wichita, in Texas, and that there was hope that the state would soon be relieved of their presence.

No. 119. Report of commissioner of Indian affairs for 1858.

I regret to state that no progress has yet been made in carrying out the provision in the act of March 3, 1857, for "collecting and establishing the southern Comanches, Wichitas, and certain other bands of Indians, on reservations to be located south of the Arkansas river and west of the ninety-eighth degree of longitude." Those Indians are wild and lawless, in their disposition and habits, and cannot be brought together without danger of difficulties accruing among themselves, or of their committing forays upon the western Choctaws and Chickasaws, with whom they will be brought into close proximity, and whom we are bound, by treaty stipulations, to protect from such casualties. A strong military force, in the region of country where it is intended to settle them, is absolutely necessary, to hold in check and control them, and to afford the requisite protection to the agent appointed to take them in charge. Ex. Doc. 268.

This report shows that in November, 1858, the *Wichitas* were still *wild* and *lawless* Indians, whom it was dangerous to colonize in the leased district.

No. 120. Report of Indian agent, San Antonio, Texas, December 19th, 1858.

The Wichitas have, on several occasions, within the last three years, been refused permission by me to emigrate to Texas and settle on the reserve at Brazos. Ab. 264.

This report shows that the *Wichitas* looked not to the leased district for a home, but to the Brazos river in Texas.

No. 121. Order of C. E. Mix, acting commissioner of Indian affairs, March 30, 1859.

So soon as it may be practicable and safe for the Wichitas to remove to their new location, you will require them to go there, giving them to understand that it is to be their permanent home, and that none of them must leave the reservation, without the permission of the agent. Ab. 270.

This order implies that pressure was requisite to place and keep the Wichitas in their *new* "*home*."

No. 126. Report of Indian agent, Wichita agency, Indian Territory, Oct. 1, 1868.

The work of building fences and putting in crops commenced, with commendable energy and zeal, on the part of the Shawnees and Delawares, they using the ploughs with very little assistance and instruction: the Wichitas and some of the other tribes refusing to make any effort in that direction, saying they could not think of making a squaw of themselves, by working. The women and children, however, managed to plant and cultivate an amount of ground beyond my expectation. Ab. 27.

And yet on page 21 of their answer the appellants paint this picture of Wichita rural life:

The Wichita Indians were always industrious, peaceful and non-nomadic. They were an agricultural people, raising crops of corn, melons, and pumpkins, which they traded with the Comanches and other roving tribes. Ans. Ab. Rec. 34

No. 127. Report of Indian agent, Wichita agency, August 20, 1877.

The Wichitas, Wacoes and Towaconies are virtually one people, speaking the same language, the names Wacoes and Towaconies being given to the descendants of two bands of the Wichitas, who, about one hundred years ago, left the main tribe on the Neosho river, in Kansas, one taking up a residence on the Arkansas river, near the present town of Wichita, and the other pushing on to Texas. Ab. 273.

This opinion is fortified by the Wichita tradition to which Uts-tuts-kins and Niastor testify. And if any alleged prehistoric fact, connected with the Wichitas, has such verisimilitude as to warrant its acceptance on Indian tradition, it is this fact of their early habitat on the Neosho river, in what is now the state of Kansas.

No. 141. Report of Indian Agent, Anandarko, September 1, 1881.

It is said that about one hundred years ago two bands left the main tribe (the Wichitas) on the Neosho river, in Kansas, one taking up its residence on the Arkansas river, near the present town of Wichita, Kansas, and the other going to Texas. Apx. 206.

No. 155. Report of Commissioner of Indian Affairs for 1890.

The Wichita reservation, in Indian Territory, is defined in an unratified agreement, made October 19, 1872: * * there is no evidence that they hold it by any higher title than that contained in said unratified agreement, although they claim to have resided thereon for many years prior to said order. Apx. 272.

No. 149. Report of Indian Commissioners, Washington, August 8, 1846.

The other little bands, viz: Witchataws, Toweash, Towaconies, Keechies, and Wacoes are inconsiderable, in number, and degenerate in character. * * They have the reputation of being the best horse thieves in the prairie. Apx. 179

Report of Texas Commissioner of Indian Affairs, Houston, November 3, 1838.

The Pawnee Picts or Toweashes reside on Red river; they are sometimes in the United States and sometimes in Texas. * * They are in alliance with the Wacoes and Caddoes, and their depredations are generally confined to the upper Brazos country. Apx. Sen Reps 30 Cong 1 Sess. p. 479

The report of August 8, 1846, shows what these "industrious, peaceful, non-nomadic agriculturists" were doing, in 1846. The report of the Texas commissioner shows where they "resided," in 1838.

No. 153. P. H. Dunbar in his "Pawnee Indian" says:

* * The Wichitas, I am told, have a tradition that the primitive home of themselves and the Pawnees was upon the Red river, below the mouth of the Wichita. This would place them in close proximity with the Caddos. Rec. 131.

It must certainly be easier to accept this tradition, which locates the primitive home of the Wichitas in Texas, than the tradition that the progenitor of the Wichitas was born of a rock, thereafter named the Wichita mountain,—a repetition of the old fiasco: "*Parturiunt montes, nascetur ridiculus mus.*"

No. 154. Bienville's Journal shows that in 1700 the Wichitas were on the Washita river, in the state of Louisiana. Rec. 132.

No. 160. The deposition of James Mooney shows that the Wichitas themselves gave the name "Wichita mountain" only to the extreme western spur of the range, commonly called the Wichita Mountains, and that they said they gave their name to it, because they had once lived there. They said they left it and went to Fort Sill, in the summer "after the stars fell," that is to say, in the summer of 1834. Colonel Dodge found the Wichitas at the western extremity of this range in 1834. But they had not resided there long; for the old Wichita, Uts-tuts-kins, who also testifies that the Wichitas left this locality in 1834, says that he was a *young man* when Colonel Dodge visited the Wichita village, in 1834, and that when they moved from Texas to that village he was eleven years of age. They may therefore have resided five or six years at the western extremity of the Wichita range, in the southern part of the leased district. Rec. 186.

No. 161. The letter of Stokes and Arbuckle, dated September 15, 1835, shows that some of the Wichitas were then in the state of Texas, and some north of the Red river. Rec. 138.

No. 163. Wm. Darby's Description of Louisiana, Second Edition, 1817, contains the following statement:

The Panis or Towiache Indians have their village at 97° W. lon. and 35° 20′ N. lat. * A ridge of hills winds along the south bank of Red

river near the Panis village, discharging the waters southwards towards the gulf. Rec. 139.

This *probably* locates the village in Texas. It *certainly* does not locate it in the leased district; for the eastern boundary of that district is the 98th meridian.

At this point it may be well to ascertain the location of the Toyash village visited by Col. Dodge, in 1834. The counsel for the Wichitas located this village near the mouth of the stream named on the map, Elk creek, which they asserted was near the centre of the leased district. They established the location by the deposition of Capt. H. L. Scott. Capt. Scott testified on the 9th day of July, 1896. He stated that he was then 43 years of age. Col. Dodge's visit to the Toyash village, therefore, occurred 19 years before Capt. Scott was born. The captain does not testify that he had any personal knowledge as to the place where it occurred. I quote the concluding paragraph of his direct testimony as follows:

The witness having answered the above interrogatories in compliance with the rule of the court requiring him to state whether he knows of any other matter relative to the claim in question, and if he do to state it, says:

I have a copy of Catlin's "North American Indians." Catlin was an artist, and made a trip through this country with the First United States Dragoons in 1834. There is in this book a picture of the Wichita village on the North Fork of Red river as it was in 1834, at the base of the Wichita mountains, in what is now known as "Devil's Canyon." Rec. 192.

Capt. Scott says that the village, represented in Catlin's picture, was in the "Devil's Canyon." And the counsel asserted that the village, visited by Col. Dodge, was the village represented in Catlin's picture, and that the Devil's Canyon was at a point near the mouth of Elk creek. But how did Capt. Scott know that 19 years before his birth these Toyash wigwams were located in the Devil's Canyon? The captain's testimony, on this point, is not even hearsay evidence. It is guesswork of the lowest order and most valueless character. Capt. Scott did not know

that the picture, which he found in Catlin's book, was a representation of a Wichita village, occupied in 1834, in the Devil's Canyon, or anywhere else. Catlin was never within 50 miles of the spot where Col. Dodge met the Toyash. The theory, according to which this spot is located near the mouth of Elk creek, is based on the discovery, by W. F. Cummins, in 1891, of the remains of a Mexican village and of an Indian village near that locality. The time when the Indian village was occupied is altogether conjectural. So is the identity of the occupants of that village. Moreover Cummins testifies that *the remains of the Mexican village were in the "Devil's Canyon," and those of the Indian village were half a mile distant.*

The counsel for the Wichitas, however, has presented the testimony of another witness, whose statements on this point are neither hearsay, nor guesswork, but are made on his own personal knowledge and furnish the only testimony given, on personal knowledge, on this point, in the case at bar. This witness was the Wichita, Uts-tuts-kins. He testified, in 1882, as follows:

Afterwards the young chief concluded would all move to Neosho; after living there some time they moved to Salt Fork, and from there to the Red hills on the north fork of the Canadian, where they made corn three years, and then moved to mouth of Otter creek, on North fork of Red river, and divided into three parties—one to the mouth of the Little Wichita on main Red river, and one to Clear fork of Brazos, and the other remained at the mouth of Otter creek.

The chief at mouth of Otter creek died, and his people joined those at mouth of Wichita, and in five years the chief died at Clear fork, and his people joined those at mouth of Wichita, and all were together again and lived there a long time. I (Uts-tuts-kins) was born at the mouth of the Wichita. While we lived there white men came in seach of money, had a little fight, and whites left.

Afterwards Wichitas disagreed as to where they should stop, but went to mouth of Cache creek. I was then young. At Cache creek had trouble with Osages, and wounded our chief in cheek; and then we had smallpox, and lost more than half our people; from there we moved to mouth of Otter creek. I was then 11 years old. While at mouth of Otter creek I concluded to go with some young friends on warpath east, and saw no Indians, but when coming home found long trail made by Indians or whites, but when we got home found soldiers holding

council. Soldiers come with boy they had captured at Coffey's bend on Red river. Our chief said we would some day have to do as whites do. This was just 48 years ago. Moved from Otter creek to where Fort Sill is now, and remained 6 years. Our big chief was buried there, and we afterwards moved to Rush Springs. We lived there about 8 years when Van Dorn had fight with Comanches near our place; that was in 1858. We then moved to Caddo creek, near Fort Arbuckle; found Indians and soldiers and considered them intruders, but did not care to make any trouble with them.

The above and foregoing is a correct translation of statement made by Uts-tuts-kins in the spring or summer of 1882. Apfo. 136, 137.

Uts-tuts-kins names the mouth of Otter Creek six times, and locates the village, where the council was held, at the mouth of Otter Creek, which is only six or eight miles from Red river; but is more than 40 miles from the nearest point in the Wichita reservation.

No. 76. Report of commissioner of Indian affairs for 1845.

This is a large district, and requires the undivided attention of the present efficient superintendent, owing to the unsettled condition of the Comanches, Witchetaws and other tribes who lead a wandering life. Sometimes being in Texas and sometimes in the United States, it has been impossible to extend over them the eye of this department. They have neither belonged, hitherto, to the one government, nor to the other; and, although several attempts have been made to negotiate with them, every effort of the kind has thus far proved unsuccessful. Apfo. 249.

This report shows that in 1845 the Wichitas belonged neither to the republic of Texas nor to the United States, but were sometimes on one side of the boundary line and sometimes on the other.

No. 77. Statement of P. P. Pitchlynn, Washington, January 19, 1846.

The To-wi-ash, Waco, Tow-a-gany and Washita Indians are on the Red river, above the Cross Timbers, with their villages on both sides and near each other. Rec. 282.

No. 78. Report of Commissioner P. M. Butler, Council Ground, Comanche Peak, 20 March, 1846.

The talk of each chief is herewith enclosed as expressive of their views in their own language. * *

Talk of Car-ce-ro-ka, chief of the Wichita and Towiash tribes.

"My Brother: We got the word that our great father had sent com-

missioners here to see us, and that our red brothers, the Muscogees, Cherokees, Chickasaws and Choctaws were with them, to make a big peace. When we first heard it we were scared to death. Some of our young men had been out, on a war party, and had stolen some of the commissioners' horses. We did not stop to get up our horses, but catched the first we could come to, and hurried here to meet you. * * From this day forward there shall be no more killing and stealing from Texas by our people; and there shall be peace as long as the sun rises and sets. We chiefs have thought deep on it, and come to this conclusion. * * Our young men have brought in all the horses, that they stole from you, and delivered them up to you to-day. All the rest that we have will be brought down and delivered at the next council, when we meet you. * * You told us to quit warring and stealing from Texas, which we agree to. But does our great father mean that we shall quit stealing from the Spaniards? Our young men must have horses from somewhere."

The Towacone chief spoke a second time and said:

"It is my duty to tell the big captain that my red brother, the Kechis has told him a lie. He has said his people have no horses stolen from Texas. I saw seven head, myself, about a week ago." Rec. 254.

This report shows that, in 1846, the Wichitas resided in Texas.

No. 80. Statement, by Indian agent, July 17, 1846, of "*Names of Indian delegation from the Prairies of Texas*," who visited Washington, in that month. This list includes the names of Yo-sa-quash and Ish-ar-e-wah, chiefs of the *Wichitas*. It is accompanied by a recommendation that a large medal be awarded to Yo-sa-quash, and a smaller one to Ish-ar-e-wah. It is also accompanied by an estimate of the expense of returning the delegates to Torry's Trading House, *on the Brazos river, in the state of Texas*. These documents show that the *Wichitas*, who made the treaty of 1846, lived in Texas. Rec. 66.

No. 81. Report of Indian agent, Austin, Texas, October 27, 1846.

The Wacos, Wichitas, and Keechies have stolen quite a number of horses, on our northern frontier, but have spilled no blood.

No. 82. Report of Indian agent, Austin, Texas, May 16, 1847:

The Comanches, Lapans, Tonkahras, Caddoes, Ionies, Anandacos Keechies, and the small band, of Shawnees, Delawares and Cherokees

are all perfectly peaceable, and I can hear nothing of a hostile character charged against them.

The Waccos, Towacorros, and Wichitas have committed numerous depredations on our citizens, in the last few months. The latter part of Feby. last, they attacked a party of our citizens and killed two men. They are continually down on our borders, and have stolen several hundred head of horses. In the immediate vicinity of this place, about ten nights since, they stole 20 horses, and made their escape with them.

I would again earnestly call the attention of the department to the absolute necessity of taking prompt measures to chastise those Indians. It is a loss of time to think of inducing them to remain quiet by peaceful measures. They have been in treaty with the Texas and U. S. governments, for 4 or 5 years, and broken their treaty engagements almost as soon as made, and are now doing more damage to our citizens than at any previous time. And, as the Chief Aquaquash says, "They were born thieves and nothing but force will prevent them from stealing." They not only depredate on the whites, but steal from the friendly Indians, and must, in a short time, unless taken in hand, cause much difficulty, as neither our citizens or the friendly Indians will put up with them much longer. * * They steal our horses and kill our citizens, with perfect impunity. The Comanches and all the Indians that are true are extremely anxious that the government should send troops into the Indian country, and particularly that those bands should be broken up. They offer their services as guides, whenever the government will order a force sufficient for that purpose. * * Rec. 254. 255.

It will be found that the word "borders," as used by Major Neighbors in many reports, refers, not to that part of Texas immediately south of Red river, but to the region south of the boundary between the whites and Indians in Texas, previously designated by General Houston. This report shows that in 1847 the Wichitas were, as usual, in the state of Texas, murdering citizens and stealing horses.

No. 84. Report of Indian agent, July 15, 1847. He reports that no depredations had been committed by the Wichitas, since June 22, 1847. 244. Rec. 69.

No. 85. Report of Major George Andrews, September 3, 1847. The Wichitas visit Fort Washita in the Chickasaw nation. They are "erratic" Indians. 245. Rec. 68.

No. 86. Report of Indian agent, September 14, 1847. He found the Wichitas in Texas, about 175 miles above Torry's Trading House. He says:

I found the Indians residing in that neighborhood, viz: the Keechies, Wacos, Wichitas and Tah wah carros (whose village is about six miles further up the river) in a very contented and happy condition. Ab. 25.

No. 87. Report of Indian agent, October 12, 1847.

He reports that the Wichitas were present at the distribution, at the Texas agency, on the 28th of September, 1847. Aff. 252.

No. 88. Report of Indian agent, March 2, 1848.

The only depredation, that can be traced to these bands, is a theft, committed by three Keechies and one Wichita, who stole twelve horses from our settlements. Aff. 253.

No. 89. Report of Indian agent, March 16, 1848.

The lines proposed to be run, for the purpose of establishing the boundaries of "Peters'" colony, will pass directly through the country now occupied by the Keechies, Wichitas, Wacos, Tah wac carros, Caddos, Ionies, and Tenawish Indians. Rec. 256

This colony was wholly within the state of Texas. And this report shows that the Wichitas were there in 1848.

No. 90. Report of Indian agent, April 28, 1848. This report encloses the following statement of C. E. Barnard, interpreter:

On the 9th inst. three surveyors, engaged in running the line of Peters' colony, were killed and scalped, by some Indians, supposed to be Wichitas. Aff. 254.

This would seem to indicate the presence of Wichitas in Texas.

No. 91. Report of Indian agent, June 15, 1848.

The Wichitas still hold themselves aloof from our councils, and occupy a very doubtful and threatening position, since their people were killed by Capt. Highsmith's company. I am informed, by the friendly Indians, that they are making preparations to attack our frontier, as soon as their corn is harvested. Aff. 255.

This shows that the Wichitas were then raising corn in Texas. The frontier mentioned was the line, within the state of Texas, separating the Texas Indians from the whites.

No. 92. Report of Indian agent, August 10, 1848.

Since the date of my last report there has been no movement worthy of notice among our border tribes of Indians, until about the 1st instant, when a small party, supposed to be Wichitas, Wacoes, and some of the upper Comanches, made a descent on our frontier, visiting the stations of Captains Highsmith and Crump, when they succeeded in stealing from the former company thirty, and the latter twenty, horses. (App. 257.

This frontier was the line separating the Texas Indians from the whites.

No. 94. Report of Indian agent, September 14, 1848.

I have not as yet been able to see any of the Wichitas, but have sent them a talk, and shall proceed to the upper Brazos to see them in a few days. (App. 258,

This shows that the Wichitas were then in Texas.

No. 95. Report of Indian agent, December 26, 1848.

During the whole fall they (the Wichitas) have been absent from their villages, under the pretext of hunting. They have been most of the time on the headwaters of Red river and in the neighborhood of the Wichita mountains. (App. Rec 8.

This report, by the agent for the Texas Indians, shows that the villages of the Wichitas were in Texas, in 1848; but they had been, for some time, absent from their villages.

No. 96. Report of Indian agent, March 7, 1849.

These Indians (Wichitas and other tribes) range promiscuously across our frontier, from Red river to the Rio Grande, during the greater portion of the year, and seek shelter, during the winter, in the upper Cross Timbers of Texas. (App. 258

This report shows not only that the Wichitas ranged over northern Texas, but that they wintered in the Texas Cross Timbers.

No. 97. Report of H. G. Catlett, May 12, 1849:

He says the Wichitas, Towash and Keechies live near together, upon the Brazos head of the Trinity, and upon the Big Wichita (the main southern branch of Red river). These localities were in Texas. (App. 259.

No. 98. Report of Lieutenant F. Hamilton, Fort Graham, Texas, May 31, 1849.

Aquaquash, chief of the Wacoe Indians, arrived at this post, on the 25th inst., with a small portion of his tribe. He informed me that he

had succeeded in making the Wichitas deliver up to him a portion of the horses they had stolen from citizens of this state. * * He also informed me that a small portion of his tribe, together with a large party of Towakarros, were not far behind, were bringing in the stolen horses, together with Tad-a-da, chief of the Wichitas, and a few of his warriors * * The horses, that Aquaquash recovered, were brought in on the 27th inst., accompanied by nearly one hundred Wacoes, Towakarros and Wichitas. * * I had, at his request, a talk with the great Wichita chief, Tad-a-da. He has promised in future to be friendly, and to do all in his power to prevent his tribe from stealing horses.

This shows that in 1849 the Wichitas were in Texas.

No. 99. Report of Major R. A. Arnold, Fort Worth, Texas, June 18, 1849.

Ne-o-cho-se-ras, chief of the Tah-wah-carros, and Gideos, with two other chiefs of the Wichita tribe, are now visiting me. This is the party who lately came into Fort Graham (on the Brazos distant 60 miles), under A-qui-quash, the Wacoe chief, bringing and delivering up some 35 horses and mules, which they had taken from the Wichetas. These horses, &c., had been stolen from citizens by the Wichetas.

This report, corroborating that of Lieut. Hamilton, shows that the Wichitas were in Texas in 1849.

No. 100. Report of Lieutenant F. Hamilton, Fort Graham, Texas, June 22, 1849.

Since this post has been established, it has been visited by parties of the Delawares, * * Wichitas and Towaharros, at different times.

This report also shows that the Wichitas were in Texas in 1849.

No. 103. Report of interpreter, Barnard's Trading House, Texas, October 9, 1849.

The Keechis, Wacoes, Wichitas and Tonkahuas are all quiet and awaiting your arrival, to hear what the president has to say to them.

This report shows that the Wichitas were in Texas, in October, 1849.

No. 104. Report of Indian agent, Austin, Texas, November 2, 1850.

The Wichitas, Tonkaways and Keechies I did not see. They are, as I am informed, somewhere on Red river, and have formed a general combination for the purposes of plunder. It is this combination that does most of the horse stealing along the frontier. I do not expect them at the council; consider them beyond my control, and refer them to the government, as a set of rascals who ought to be exterminated.

This report shows that the Wichitas were in Texas in 1850.

No. 105. Statement of C. G. Todd, March 25, 1851. Referring to the boundary line between the whites and Indians in Texas, established by Gen. Houston, in 1843, he says that it has tended to the preservation of peace. Aff. 264.

No. 106. Report of Indian agent, July, 1851. He reports that the Wichitas have "left Texas and are now inhabiting the Washita mountains north of Red river." Aff.

No. 107. Report of Indian agent, Fort Graham, Texas, March 18, 1852.

They (the Comanches) say that most of the depredations on our frontier are committed by the Witchitas, and the Comanches north of Red river. Aff. Rec. 70.

No. 108. Report of Indian agent, Fort Belknap, Texas, June 12, 1852.

As reported, under date of May 12, last, I have been making a tour in the Indian country, and visiting the Indian villages on the Brazos. I find that the Wichita Indians, formerly of Texas, and associates of the Wacoes and Towaccarros, have recently been making very frequent depredations on the frontiers of Texas below this and are now constantly engaged in stealing horses, and passing through this vicinity, on their way to their homes, in the Wichita mountains beyond Red river.

These depredations are recently becoming so frequent, two or three small parties having passed along here with stolen horses, since I left Fort Graham, that I have conceived it to be my duty to call on the military, for a party of dragoons, for the purpose of visiting the Wichitas, at their homes, recovering the stolen property in their possession, and taking some hostages, or other security, for the future. I apprehend no occasion to resort to force. Aff. Rec. 70

This report shows that the Wichitas, having previously resided in Texas, were in the Wichita mountains in June, 1852, and were constantly making depredations thence into Texas and stealing horses in that state. Aff.

No. 109. Report of George T. Howard, superintendent, June 14, 1852. His "Estimate of the different tribes of Indians in Texas" includes the Wichitas. Aff. Rec. 71.

No. 110. Report of Indian agent, Fort Graham, Texas, October 8, 1852. Aff. 265.

Under date of 12 June, last, I communicated the fact that the Wichita
had been in the habit of visiting the frontiers of Texas, in small parties,
and committing occasional depredations on her citizens, and, although
they are perhaps not now strictly within the jurisdiction of Texas, I con-
ceived it to be my duty to make an effort to arrest these practices, and
establish some understanding with them, more especially as they have
been parties to treaties with the government heretofore made within the
limits of this state, and so far as I know, are not under the charge of any
other officer or agent of the government.

I accordingly dispatched a messenger (a chief of the Wacoes) to their
villages, in the Wichita mountains, with some tobacco, and a talk to them
upon the subject of their depredations, and a demand of such stolen
property as they had in their possession. Soon afterwards, and while I
was out in the Indian country, another party of this tribe robbed the
train of W. Mackay of eight horses and mules. I thereupon procured a
small escort, under command of Lt. Beall, of 5th Inf., and started after
my messenger, intending to visit the Wichitas in person. We encountered
a succession of rains and high waters, which so embarrassed and delayed
us, that after swimming several streams, we were finally stopped by Red
river, within forty-five miles of the Wichita village, and being too nearly
out of provisions to await the subsidence of the stream, were compelled
to return.

My messenger brought back eight stolen horses, which were given up
by the Wichitas, and reported that the chief of that tribe expressed the
determination to put a stop to these aggressions of his people.

Besides these I recovered four government horses, from other Indian
tribes, while on this expedition.

Lieutenant Beall afterwards, in the month of August, while out in
search of Captain Marcy and his command (then reported to have been
massacred by the Comanches), visited the Wichita villages, and held a
talk with them. They then delivered up six more horses and mules and
so far as I know, have committed no outrage on this frontier, since the
robbery of Mackay's train. * * Appendix, 266

This report shows that in October, 1852, the Wichitas
still made their rendezvous, in the Wichita mountains
the base of their horse-stealing operations in Texas.

No. 111. Report of Indian agent, supposed to have been made in 1853.

Having taken considerable pains to get information with regard to
those associate bands of wild Indians, the Wacoes, Wichitaws, Tow-
carres and Keechies, I submit it to the department for what it is worth.
These bands, although small in number, are more trouble and commit
more depredations upon the people of Texas than all the other bands that
roam through her territory, extending their predatory excursions down
into the settlements, as far as the San Antonio river; travelling mostly
on foot, avoiding the military posts, they swoop down upon the settlers
and drive off their animals with impunity, not even sparing their enemies
the Delawares and other Indians friendly to the whites. This leads to
frequent hostile meetings, and whilst with me, a party of Delawares
brought in the bleeding scalps of some Wacoes, who were caught stealing
their horses. Exp. Rec. 71

This report shows that the Wichitas were then roaming through Texas territory, committing depredations upon the people as far south as the San Antonio river.

Second.

The Treaty of 1835.

The Wichitas claim another basis for their title to the land in controversy. They base it upon an admission alleged to have been made on the 24th of August, 1835, in a treaty between the United States and the Comanches, Wichitas and other Indians. But this invocation of the treaty of 1835, in maintenance of the Wichita title, must prove unsuccessful for many reasons.

In order to establish their claim that, by this treaty, the United States and the Choctaws recognized the aboriginal title of the Wichitas to the district in controversy the counsel assume:

(1.) That the treaty refers to settlements, towns and hunting grounds, in the leased district, and *not elsewhere*, and requires the parties, who are Indians, to refrain from certain acts, in the leased district, and *not elsewhere*.

(2.) That, as a consequence, the United States and the Choctaw nation solemnly admitted that the Wichitas had such towns and hunting grounds in the leased district.

(3.) That thereby the United States and the Choctaw nation recognized the possession, by the Wichitas, of the "customary" Indian title by occupancy to that country.

I submit that the opposing counsel mistake the scope and effect of this treaty. There were three parties to the treaty: (1) The United States; (2) The Comanche and Wichitaw nations and their associated bands, or tribes, of Indians; and (3) The Cherokees, Muscogees, Choctaws,

Osages, Senecas and Quapaws. The counsel for the Wichitas show, on page 24 of their answer, that, prior to 1859, the Wacos, Towaconies, Caddos, Ionis, Keechies, and Delawares, some or all of whom must have been the associated bands mentioned in the treaty, never lived in the leased district. At the date of the treaty their home was in a foreign country, in Texas, one of the provinces of Mexico. They had hunting grounds in Texas. Whatever towns and settlements they had were in Texas. If they had any hunting grounds, or towns, or settlements in the leased district, or elsewhere in the United States, they held them, not by an aboriginal title, but temporarily by permission of the United States, or of the Choctaw nation. If the United States and the parties of the third part, by signing this treaty, admitted that the Wichitas had "towns and hunting grounds and dominion," in the Wichita reservation, between the Washita and Canadian rivers, they also admitted that the Comanches, and their associated bands, had "towns and hunting grounds and dominion" in that reservation. If, by such admission, they acknowledged that the Wichitas held an aboriginal title to this Wichita reservation, as a hunting ground, they also acknowledged that each one of the associated bands, whoever they were, and also the Comanches held such an aboriginal title.

The "treaty with the Comanche and Witchetaw nations and their associated bands or tribes of Indians," signed August 24, 1835, and the "treaty with the Kioway, Ka-ta-ka and Ta-wa-ka-ro nations and their associated bands or tribes of Indians," signed May 26, 1837, contain, respectively, the following articles:

Article 1. There shall be perpetual peace and friendship between all the citizens of the United

Article 1st. There shall be perpetual peace and friendship between all the citizens of the United

States of America, and all the individuals composing the Comanche and Witchetaw nations and their associated bands or tribes of Indians, and between these nations or tribes and the Cherokee, Muscogee, Choctaw, Osage, Seneca and Quapaw nations or tribes of Indians.

Article 2. Every injury or act of hostility by one or either of the contracting parties on the other, shall be mutually forgiven and forever forgot.

Article 3. There shall be a free and friendly intercourse between all the contracting parties hereto, and it is distinctly understood and agreed by the Comanche and Witchetaw nations and their associated bands or tribes of Indians, that the citizens of the United States are freely permitted to pass and repass through their settlements or hunting ground without molestation or injury on their way to any of the provinces of the republic of Mexico, or returning therefrom, and that each of the nations or tribes named in this article, further agree to pay the full value for any injury their people may do to the goods or property of the citizens of the United States taken or destroyed, when peaceably passing through the country they inhabit, or hunt in, or elsewhere. And the United States hereby guaranty to any Indian or Indians of either of the said Comanche or Witchetaw nations, and their associated bands or tribes of Indians, a full indemnification for any horses or other property which may be stolen from them: Provided, that the property so stolen cannot be recovered, and that sufficient proof is produced that it was actually stolen by a citizen of the United States, and within the limits thereof.

Article 4. It is understood and agreed by all the nations or tribes of Indians parties to this treaty,

States of America and all the individuals composing the Kioway, Ka-ta-ka, and Ta-wa-ka-ro nations and their associated bands or tribes of Indians, and between these nations or tribes and the Muscogee and Osage nations or tribes of Indians.

Article 2d. Every injury or act of hostility by one or either of the contracting parties on the other, shall be mutually forgiven and forever forgot.

Article 3d. There shall be a free and friendly intercourse between all the contracting parties hereto; and it is distinctly understood and agreed by the Kioway, Ka-ta-ka, and Ta-wa-ka-ro nations, and their associated bands or tribes of Indians, that the citizens of the United States are freely permitted to pass and repass through their settlements or hunting ground without molestation or injury, on their way to any of the provinces of the republics of Mexico or Texas, or returning therefrom, and that the nations or tribes named in this article further agree to pay the full value of any injury their people may do to the goods or property of the citizens of the United States, taken or destroyed when peaceably passing through the country they inhabit, or hunt in, or elsewhere. And the United States hereby guaranty to any Indian or Indians of the Kioway, Ka-ta-ka, and Ta-wa-ka-ro nations, and their associated bands or tribes of Indians, a full indemnification for any hor es or other property which may be stolen from them, provided that the property so stolen cannot be recovered, and that sufficient proof is produced that it was actually stolen by a citizen of the United States, and within the limits thereof.

Article 4th. It is understood and agreed by all the nations or tribes of Indians, parties to this treaty,

that each and all of the said nations or tribes have free permission to hunt and trap in the Great Prairie west of the Cross Timbers, to the western limits of the United States.

Article 5. The Comanche and Witchetaw nations and their associated bands or tribes of Indians, severally agree and bind themselves to pay full value for any injury their people may do to the goods or other property of such traders as the president of the United States may place near to their settlements or hunting ground for the purpose of trading with them.

Article 6. The Comanche and Witchetaw nations and their associated bands or tribes of Indians, agree, that in the event of any of the red people belonging to the nations or tribes residing south of the Missouri river and west of the state of Missouri, not parties to this treaty, should visit their towns or be found on their hunting ground, that they will treat them with kindness and friendship and do no injury to them in any way whatever.

Article 7. Should any difficulty hereafter unfortunately arise between any of the nations or tribes of Indians parties hereunto, in consequence of murder, the stealing of horses, cattle, or other cause, it is agreed that the other tribes shall interpose their good offices to remove such difficulties, and also that the government of the United States may take such measures as they may deem proper to effect the same object, and see that full justice is done to the injured party.

Article 8. It is agreed by the commissioners of the United States, that in consequence of the Comanche and Witchetaw nations and their associated bands or tribes of Indians having freely and will-

that each and all of the said nations or tribes have free permission to hunt and trap in the Great Prairie west of the Cross Timbers to the western limits of the United States.

Article 5th. The Kioway, Ka-ta-ka, and Ta-wa-ka-ro nations and their associated bands or tribes of Indians agree and bind themselves to pay full value for any injury their people may do to the goods or other property of such traders as the president of the United States may place near to their settlements or hunting ground for the purpose of trading with them.

Article 6th. The Kioway, Ka-ta-ka and Ta-wa-ka-ro nations and their associated bands or tribes of Indians, agree, that in the event any of the red people belonging to the nations or tribes of Indians residing south of the Missouri river, and west of the states of Missouri and Arkansas, not parties to this treaty, should visit their towns, or be found on their hunting ground, that they will treat them with kindness and friendship, and do no injury to them in any way whatever.

Article 7th. Should any difficulty hereafter unfortunately arise between any of the nations or tribes of Indians, parties hereunto, in consequence of murder, the stealing of horses, cattle, or any other cause, it is agreed that the other tribes shall interpose their good offices to remove such difficulties; and also that the government of the United States may take such measures as they may deem proper to effect the same object, and see that full justice is done to the injured party.

Article 8th. It is agreed by the commissioners of the United States that in consequence of the Kioway, Ka-ta-ka and Ta-wa-ka-ro nations and their associated bands or tribes of Indians having freely and will-

ingly entered into this treaty, and it being the first they have made with the United States or any of the contracting parties, that they shall receive presents immediately after signing, as a donation from the United States; nothing being asked from these nations or tribes in return, except to remain at peace with the parties hereto, which their own good and that of their posterity require.

Article 9. The Comanche and Wichetaw nations and their associated bands or tribes, of Indians, agree, that their entering into this treaty shall in no respect interrupt their friendly relations with the republic of Mexico, where they all frequently hunt and the Comanche nation principally inhabit; and it is distinctly understood that the government of the United States desire that perfect peace shall exist between the nations or tribes named in this article and the said republic.

Article 10. This treaty shall be obligatory on the nations or tribes parties hereto from and after the date hereof, and on the United States from and after its ratification by the government thereof.

Done and signed and sealed at Camp Holmes on the eastern border of the Grand Prairie, near the Canadian river in the Muscogee nation, this twenty-fourth day of August, one thousand eight hundred and thirty-five, and of the independence of the United States the sixtieth.

ingly entered into this treaty, and it being the first they have made with the United States, or any of the contracting parties, that they shall receive presents immediately after signing, as a donation from the United States; nothing being asked from the said nations, or tribes, in return, except to remain at peace with the parties hereto, which their own good and that of their posterity require.

Article 9th. The Kioway, Ka ta-ka and Ta-wa-ka-ro nations, and their associated bands or tribes of Indians, agree, that their entering into this treaty shall in no respect interrupt their friendly relations with the republics of Mexico and Texas, where they all frequently hunt and the Kioway, Ka-ta-ka and Ta-wa-ka-ro nations sometimes visit; and it is distinctly understood that the government of the United States desire that perfect peace shall exist between the nations or tribes named in this article, and the said republics.

Article 10th. This treaty shall be obligatory on the nations or tribes, parties hereto, from and after the date hereof, and on the United States from and after its ratification by the government thereof.

Done and signed and sealed at Fort Gibson, this twenty-sixth day of May, one thousand eight hundred and thirty-seven, and of the independence of the United States the sixty-second.

Appendix 16

The stipulation of article 3, in the treaty of 1835, was expressly made applicable to each of the other parties of the second part, as well as to the Comanches and Wichitas. This article requires the Comanche and Wichita nations and their associated bands or tribes to permit citizens of the United States to pass and repass freely and

without molestation through their settlements, or hunting grounds, on their way to and from any of the provinces of the republic of Mexico. There is no intimation that these settlements or hunting grounds are confined to the leased district. The language is general,—without retriction.

Again each of the nations or tribes, named in this article, agrees to pay the full value for any injury, their people may do, to the goods or property of citizens of the United States, taken, or destroyed, when peaceably passing through the country they inhabit, or hunt in, or elsewhere.

Article 4 is not more a grant of the right to hunt and trap west of the Cross Timbers *by* the Wichitas, *to* any or all of the other tribes who were parties to the treaty, than it is such a grant *by* each of the other tribes *to* the Wichitas. The language of the article places them all on the same footing. If this treaty of 1835 means that the Wichitas had settlements and hunting grounds, in the leased district, and were, therefore, the owners of that district, it also means that the "associated bands" had settlements and hunting grounds, in that district, and were, therefore, its proprietors. But there is no proof, and there can be no pretense that either of these bands, except the Comanches, ever resided for a single month in this district.

The "pristine habitat" of the Comanches, was probably south of the Red river. Some of them had crossed the river, and hunted in the leased district, and established camps or settlements there. The obligation of the Comanches, under the third article of the treaty, to give free and safe passage through their hunting grounds and camps, or settlements, south of the Red river, was as clear and strong as was their obligation to give free and safe passage through camps, or settlements and hunting

grounds, which the United States, by the terms of that treaty, permitted them to occupy temporarily north of the river. The obligation imposed on the other parties of the second part, to accord free and safe transit through their ancient towns and settlements and hunting grounds *south* of the Red river, was as strong as was their obligation to give free and safe transit through lands which they were permitted, by the treaty, to use as hunting grounds *north* of the river.

The obligation, imposed by article 3 of the treaty of August 24, 1835, upon the Wichitas, whose "pristine habitat" was not in the leased district, to permit the parties of the third part to pass freely and safely through the hunting ground, in the Cross Timbers, south of the Red river, which they used when Mesieres visited them in 1788, was just as plain and imperative as was the obligation which it imposed upon them, to permit free and safe transit through any region in which the United States and the Choctaws, by the treaty, permitted them to hunt, north of the Red river.

Unless the terms "settlements" and "hunting ground," in this treaty, refer to settlements and hunting ground outside the leased district, they are meaningless, as to the associated bands, who were parties to the treaty. The treaty binds each one of these bands to refrain from molesting citizens of the United States, entering their settlements, or hunting ground, on their way to any of the provinces of Mexico. The answer of the Wichitas and affiliated bands shows, and the evidence incontrovertibly proves that these bands were Texas Indians, had settlements in Texas, and had no settlements elsewhere. The treaty required them to refrain from the molestation of travellers, in their own settlements, in Texas; or, as to them, this third article of the treaty amounted to nothing.

The sixth article required these bands to refrain from doing any harm to Indians, strangers to the treaty, visiting their settlements, which settlements were in Texas, and nowhere else.

The use of the terms "settlements" and "hunting ground," in the treaty, then, did not imply that any of these bands had settlements in the leased district, and were therefore proprietors of the leased district. These words implied *per se* nothing whatever, as to the location of the settlements of any tribe, or band, included among the "Comanche and Wichita nations and their associated bands or tribes," who constituted the second party to the treaty of 1835. Nor did these words imply that either of these tribes, or nations, was the proprietor of the leased district, or of any other particular district or territory.

Nor does the statement, in the 9th article, that "the Comanches principally inhabit" Mexico (which then included Texas), imply that either of these nations, or tribes, owned the leased district. These words did imply that the Comanche tribe did not constantly, or for the greater part of the year, inhabit the leased district; but they did not imply, for they could not imply, that the associated bands did not inhabit Mexico, which included Texas,—they did not, and could not, imply that the Wichitas had not inhabited Mexico, at different times, and for long periods, prior to their removal, in 1834, to the western spur of the Wichita mountains, where Colonel Dodge found them in that year.

But the counsel for the Wichitas assert that the only parties of the second part, to the treaty of 1835, were the Comanches and Wichitas. They made this assertion in the face of the fact that, in seven different paragraphs of the treaty, the "Comanche and Wichita nations, and their associated bands, or tribes of Indians," are designated as

parties of the second part. And they contend (1) that the United States made no admission whatever as to the "associated bands;" and (2) that the United States could not have intended to admit that the Comanches had a "pristine habitat," in the leased district, because the fact was that they had not a "pristine habitat" therein. The fact that they had no "pristine habitat," in the district, proved that the United States did not intend to admit that they had such "pristine habitat." This implied, of course, that the alleged fact that the Wichitas had a "pristine habitat," in the leased district, was evidence showing that the United States intended to admit that *they* had such "pristine habitat," in that district. The admission proved the fact and, in a spirit of reciprocity, the fact proved the admission.

Suppose there were no evidence that the Wacos, Towaconies, Caddos, Ionis, Keechies, and Delawares were parties to the treaty. The material fact would remain that, if the treaty meant that the Wichitas had settlements and hunting grounds in the leased district, and were, therefore, owners of that district, it also meant that the "associated bands or tribes," *whoever they were*, had settlements and hunting grounds in the leased district, and were, therefore, owners of that district. The treaty shows that the parties to the treaty included tribes, or bands, associated with the Comanches and Wichitas. It is obvious that ownership of the leased district, by these tribes, or bands, *whoever they were*, is fatal to the claim of exclusive ownership by the Wichitas.

Now the parties, of the second part, named in the Wichita agreement of 1891, and in the act of 1895, conferring upon the courts jurisdiction of this case, are the "Wichita and affiliated tribes or bands of Indians," just as the parties of the second part, to the treaty of 1835, were

"the Comanche and Wichita nations and their associated bands or tribes of Indians." The counsel for the Wichitas, on pages 16 and 17 of their answer, say:

> These defendants (the Wichita and Affiliated Bands of Indians) admit that they comprise the remnants of the ancient tribes, the Wichitas, Wacos, Towaconies, Caddos, Ionis, (not mentioned in the petition) Keechies, and Delawares.

But then, if these tribes, or bands, were not the associates of the Comanches and Wichitas, in 1835, who were their associates? The only proofs, presented in this case, tend to show that these very bands must have been their associates. I respectfully refer the court to the statement of David G. Burnet, ante page 146; the extract from Kennedy's Texas, ante page 148; the report of A. J. Raines, ante page 150; and the report of the Texas commissioner of Indian affairs, ante page 155.

The counsel for the Wichitas contended that it was not competent for the United States, in the treaty of 1835, to secure from the Wichitas a promise, not to injure the persons or property of citizens of the United States, in their settlements, towns, or hunting grounds, in Mexico. But if it was proper, in 1835, for the United States to enter into any treaty, at all, with a band of 175 wandering Wichitas, who had been found in territory of the United States, away from their own homes, it certainly was competent for the United States to secure, from them, a pledge not to molest citizens of the United States, either while they (the Wichitas) remained in the territory of the United States, or after they returned to their own homes.

The position of the counsel was that, although the authorities had found bands of Mexican Indians, within the United States, and were anxious to secure guaranties of good behavior on their part, they could lawfully obtain no such guaranties, as to their behavior *in Mexico*, otherwise than by treaties with the Mexican government, whereby

that government should become responsible for their conduct. The government of the United States took a different view; and obtained from the "Comanche and Wichita nations and their associated bands or tribes of Indians," stipulations touching, not only their treatment of *American citizens, in Mexico*, but also their treatment of the *Mexican government, and people in Mexico*. This latter stipulation is contained in article 9, of the treaty of 1835.

As a muniment of title, this treaty of 1835 stands confronted by the treaty concluded on the 26th of May, 1837, between the "United States and the Kioway, Ka-ta-ka and Ta-wa-ka-ro nations, and their associated bands or tribes of Indians." If the court will compare these two treaties, it will be found that, with the exception of a few wholly immaterial words in the last article of each, they are, *mutatis mutandis*, absolutely identical. If it be true that, in the former treaty, the United States admitted that the Wichitas and their associated bands were the proprietors of the leased district, then, for a like reason, it must also be true, that, in the latter treaty, the United States admitted that the Kioway, Ka-ta-ka and Ta-wa-ka-ro nations and their associated bands were proprietors of the leased district. If it be true that, in the former treaty, the Muscogees and Osages acquired the right to hunt, in the territory west of the Cross Timbers, from the Wichitas, it must also be true that, in the latter treaty, the Muscogees and Osages acquired their right to hunt, in the country west of the Cross Timbers, from the Ka-ta-kas, or Ta-wa-ka-ros, or Kioways. If it be true that this grant, in the treaty of 1835, of the right to hunt, in the country west of the Cross Timbers, proved that country to be the property of the Wichitas, it must also be true that the grant, in the treaty of 1837, of the right to hunt there, proved the country to be the property of

the Ka-ta-kas, or Ta-wa-ka-ros, or Kioways. If it be true that the acceptance of the promise, in the first treaty, not to interfere with travel to Mexico, was a recognition of the title of the Wichitas to the leased district, so also must it be true that the acceptance of a like promise, in the second treaty, was a recognition of the title of the Ta-wa-ka-ros, Kioways, and Ka-ta-kas to the same land.

If the acceptance, by the United States, of the stipulation in the third article of the treaty of 1835 amounted to a recognition of the title of the Wichitas, to the leased district, the acceptance of the same stipulation in the third article of the treaty of 1837 amounted to a recognition of the title of the Ka-ta-kas, and Ta-wa-ka-ros and Kioways to that district.

If the fourth article, in the treaty of 1835, amounted to a recognition of the Wichita title, the fourth article, in the treaty of 1837, amounted to a recognition of the Ka-ta-ka title. If it recognized the title of the Wichitas, it also recognized the title of the Ta-wa-ka-ros, Kioways, Comanches, Cherokees, Muscogees, Choctaws, Osages, Senecas and Quapaws. Indeed the Osage and Muscogee titles obtained a recognition stronger than that of the Wichitas, for they were parties to both treaties, and the Wichitas were parties to only one.

The "settlements and hunting ground," referred to in articles 5 and 6 of the two treaties, include, of course, the settlements and hunting grounds of the associated bands. If the presence of these words proved that the Wichitas had, from time immemorial, had settlements and hunting grounds in the leased district, their presence also proved that the associated bands had from time immemorial had hunting grounds in the leased district. If the presence of these words proved the Wichitas to have been the

original and sole proprietors of the leased district, their presence also proved that the Kataka, Kioway and Comanche tribes were its original and sole proprietors, and that the Wichitas were, therefore, not its only "original and *sole*" proprietors. This "*proof*," like the monster in the fable, devours itself.

It is not true that, by this treaty, the United States and the Choctaws recognized, in these foreign-born Indians, a right, held from time immemorial, to the land which the United States had, in 1820, conveyed to the Choctaws in payment for their country east of the Mississippi river. It is not true that the effect of the treaty was to hold the United States to an acknowledgment of the existence of Wichita, Waco, Towaconi, Caddo, Ioni, and Keechi towns, settlements, and hunting rights, where none in fact existed. It is not true that the treaty amounted to a solemn, binding recognition, by the United States, or by the Choctaws, of any title of any kind to the land now in controversy, or to any other part of the leased district, or to the country west of the leased district. The effect of the treaty was to grant the privilege of hunting, in the western country, to *all* the parties of the second part, and also to grant that privilege to all the parties of the third part, except the Choctaws who were made owners of that western country by the treaty of October 18, 1820, and needed no new grant to secure to them the privilege of hunting on their own lands. Another effect of the treaty was to secure from these foreign-born savages, who constituted the party of the second part, a promise not to kill or rob the more civilized parties of the second part, either in Texas or in the leased district, or in the western country, or *anywhere else*.

The mere fact that the United States entered into the treaty of 1835 with the "Comanches and Wichitas and

their associated bands or tribes of Indians" is no evidence that the Wichitas were owners or bona-fide residents of any part of the territory of the United States. Nor is it any evidence that the authorities of the United States admitted or considered them to be such owners or residents. It is no more evidence that the Wichitas were, or were considered, such owners or residents, than that the Comanches or the associated bands were, or were considered, such. Learning that these Indians were within the limits of the United States, and apprehending mischievous consequences to the civilized Indians and whites, the president concluded to avail himself of their presence, within the jurisdiction of the United States, to tie their hands, as far as possible, by a treaty. The result was the treaty of 1835.

The journal of the commissioners who negotiated this treaty shows that the object of the United States was to secure peaceful relations between the powerful Comanches and the weak but vicious Wichitas, and their associated bands or tribes, on one side, and the whites and civilized and semi-civilized Indians, on the other; that the United States authorities entered into this treaty, not because they regarded the great Comanche nation, or the little Wichita tribe, or either of the associated bands, as the owners of the leased district, but because these wild Indians had located their wigwams there, for the time being, and were troublesome neighbors to other Indians, as well as to the whites.

The history of the leased district furnishes evidence tending to rebut this claim that the Wichita title was recognized by the United States, in the treaty of 1835. Seven treaties relating to this land were made, between the years 1803 and 1856, viz., with the Quapaws in 1818, with the Choctaws in 1820, with the Osages in 1825, with

the Choctaws in 1830, with the Comanches and Wichitas and their associated bands in 1835, with the Choctaws and Chickasaws in 1837, and with the Choctaws and Chickasaws in 1855. These treaties disclose no recognition, or suggestion of any title held, or claim preferred by the Wichitas, to an interest in this land. Moreover, in the treaty of 1855, the United States, instead of recognizing the Wichitas as aboriginal owners of the leased district, actually leased that district from the Choctaws and Chickasaws for the use of the Wichitas and other tribes of Indians. And on the 3d of March, 1857, an appropriation was made, by congress,

> For the expenses of collecting and establishing the southern Comanches, Wichitas, and certain other bands of Indians, on reservations to be located south of the Arkansas river and west of the 98th degree of longitude, fifty thousand dollars.

Articles 9 and 10 of the treaty of 1855 show that the Wichitas were not, prior to the negotiation of that treaty, occupants of the Wichita reservation, and that, in order to secure a place for them on that reservation, it was necessary to make an arrangement with the Choctaws and Chickasaws, who were the owners of the land.

Third.

The Fort Arbuckle Agreement.

The Wichitas assert, as the third basis of their title, that in 1859 Messrs. Rector and Neighbors, agents of the United States, promised the leased district, which included the Wichita reservation, to the Wichitas, Wacos, Towaconies, Caddos, Ionies, Keechies and Delawares; and that the acting commissioner of Indian affairs approved this action of Messrs. Rector and Neighbors. At that time these bands, including men, women and children,

numbered less than 1,500. The leased district contained 7,713,239 acres of land. It is claimed then, in effect, that this alleged action of the agents and acting commissioner was effectual to invest each man, woman and child with a title to 5,142 acres. But the fact is that the land, to which the alleged promise of Neighbors and Rector related, was not the whole of the leased district, nor was it the whole of the Wichita reservation, which contained 743,610 acres, but was only a tract of 154,093 acres, embracing a part of the Wichita reservation.

So far as the affiliated bands are concerned, the "aboriginal title" has no "pristine habitat" roots. It is merely an Arbuckle manufacture. But where did these Indian agents obtain the power to transfer, or affect, by direct or indirect means, the title to 7,713,239 acres of land, which had been the property of the Choctaws for 29 years? Such a transfer could not be effected, even by the government of the United States, otherwise than in the exercise of one of the very highest powers of sovereignty,—the power of eminent domain. The counsel think Neighbors and Rector were clothed with this exalted prerogative. They are mistaken. I respectfully refer the court, for the details of this Arbuckle miracle, to the report of Commissioner Hiram Price, printed on pages 39 and 40 of Senate Executive Document No. 13, 48th Congress, 1st Session, which document constitutes No. 5 of the claimants' proofs in rebuttal.

Fourth.

The Unratified Agreement of 1872.

Appendix, 38.

The counsel for the government contended that the Wichita and affiliated bands were entitled, not only to allotments of 160 acres of land to each man, woman and

child, amounting to 169,000 acres, but also to the proceeds of the sales of the unallotted lands, amounting to 574,010 acres. He based this alleged right of the Indians upon the unratified agreement of 1872.

On the 19th of October, 1872, Mr. Walker, the commissioner of Indian affairs, signed an agreement with certain Wichitas, Caddos, Towaconies, Wacos and Keechies, granting to them, for a home, the tract of land now known as the Wichita reservation. This tract contains 743,610 acres, that is to say, 589,517 acres more than the tract alleged to have been promised them, by Rector and Neighbors, in 1859. Mr. Walker had no antecedent authority to make this agreement, either from congress, or from the president, or from the secretary of the interior. The agreement has been twice submitted to congress, for approval, and twice rejected. The answer of the Wichita and affiliated bands contains the following averment:

> Because of the repeated recommendations of the Indians in the so-called leased district, among whom were these defendants and depredations made by Indians other than these defendants, commissioners were sent, in 1872, to the Indian Territory, from whence, in that year, were taken to Washington City certain of the chiefs and head men of the tribes and bands composing these defendants. These chiefs and head men were hastily selected by the Indian agent, prior to the departure of the commissioner, and were not, in any way, delegated or empowered to act for these defendants, in the cession of any lands.

The Indians denied that those who signed the agreement of 1872, on their behalf, had any authority to sign it; and they repudiated the agreement.

Assuming that this agreement, if the persons who signed it had been duly authorized to sign it, and it had been duly ratified by all the parties, would have justified the allotment of a part of the Wichita reservation to the Wichita and affiliated bands, and the payment to them of the proceeds of the sales of the residue of the reservation, the court must, I think, conclude that the agree-

ment, having, in fact, been signed without antecede
authority, from either party, and then repudiated
both parties, cannot constitute valid ground for a
right, title, or claim of those Indians.

But then, suppose it to be true that Mr. Walker h
been duly authorized to sign the agreement, and th
the Indian signers had been duly authorized by their r
spective bands to sign it; and suppose, further, that t
United States and the several bands of Indians had su
sequently ratified the agreement. On that hypothes
could the court lawfully render the decree demanded
the counsel for the government? He asks the court
decree (1) that to each man, woman and child of t
Wichita and affiliated bands shall be allotted 160 acres
land, in the Wichita reservation; and (2) that the pr
ceeds of the sale of the unallotted land shall also be pa
to them, *provided* they relinquish all claim to interests
other land. Under this second head of relief, he as
the United States to purchase a quitclaim of all interes
of these Indians in other lands, by the payment, to the
of the proceeds of the sale of the bulk of the Wichi
reservation. In other words, he proposes a virtual e
change of these unallotted lands for other lands claime
by the Indians. He proposes that the United States sha
acquire lands, by purchase from other Indians, and sha
pay for those lands, not with money, nor with lands
the United States, but with lands of the Choctaws an
Chickasaws.

Can this court lawfully comply with the counsel's de
mands? If the treaty of 1866 had invested the Unite
States with the absolute beneficial ownership of the lease
district, the United States could, of course, settle Indian
on a part of the land, and pay the proceeds of the sal
of the residue to the Wichita and affiliated bands. Bu

if the land is held, by the United States, on the condition to settle Indians thereon, the United States cannot settle Indians on a part, and pay the proceeds of the sale of the residue to the Witchita and affiliated bands, otherwise than in the exercise of the power of eminent domain, making just compensation to the Choctaws and Chickasaws for their interest in the land so sold.

This so-called agreement, which was signed by persons who had no antecedent authority from the United States or the Indian bands, and was repudiated by all the parties thereto, cannot be effective either to vest, or confirm, or recognize, in the Wichita and affiliated bands, a title to the Wichita reservation. Assuming that, under the treaties between the United States and the Choctaws and Chickasaws, it is competent for the United States to allot to each of these Indians 160 acres of selected land, we must, I submit, find it impossible to make the unratified agreement of 1872 a just or reasonable excuse for diverting, from the claimants to the Wichita and affiliated bands, the proceeds of the sales of the unallotted lands.

Summary of Proofs Relating to the "Pristine Habitat" of the Wichitas.

Summarizing the evidence in disproof of the claim that the leased district was the "pristine habitat" of the Wichitas, we find them located in Texas, in different years, by documentary proofs printed in the Record at pages designated as follows: 1759, 93; 1817, 139; 1824, 135; 1835, 161; 1836, 64; 1843, 133; 1844, 126; 1846, 65; 1846, 252; 1846, 253; 1847, 256; 1847, 67; 1847, 68; 1847, 100; 1848, 68; 1848, 257; 1849, 68; 1849, 69; 1849, 70; 1849, 258; 1849, 262; 1851, 63; 1854, 127; 1856, 72; 1857, 262.

We also find the Wichitas located in Texas, in different years, by documentary proofs printed in the Appendix to the Record at pages designated as follows: 1778, 89; 1788, 95; 1805, 102; 1847, 252; 1848, 253; 1848, 254; 1848, 256; 1848, 257; 1848, 258; 1849, 259; 1849, 260; 1856, 267; 1856, 268.

They are located in Louisiana, in different years, by documentary proofs printed in the Record at pages designated as follows: 1669, 127; 1688, 103; 1697, 94; 1700, 132; Prior to 1758, 98; Prior to 1761, 98.

The Wichitas are located in Texas on fourteen maps, as follows: 1802, Robin, Rec. p. 109; 1818, Melish, Rec. p. 111; 1830, Austin, Rec. p. 112; 1836, Lee, Rec. p. 113; 1837, Texas Land Office, Rec. p. 113; 1839, Hunt and Randel, Rec. p. 115; 1839, Hunt and Randel, Outline, p. 115; 1841, Kennedy, Rec. p. 116; 1858, State Map of Texas, Rec. p. 121; 1848, De Cordova, Rec. p. 122; 1848, Creutzbar, Rec. p. 122; 1846, Tanner, Rec. p. 121; Darby, Rec. p. 124; 1856, Creutzbar, Rec. p. 125.

They are located in Louisiana, on six maps, as follows: 1703, De l'Isle, Rec. p. 78; 1715, Moll, Rec. p. 81; 1722, De l'Isle, Rec. p. 82; 1703, De l'Isle, Rec. p. 90; 1720, De l'Isle (Bernard), Rec. p. 91; 1741, Popple, Rec. p. 104.

They are located west of the 100th meridian on three maps, as follows: 1836, Young, Rec. p. 114; 1841, Kennedy (No. 2), Rec. p. 117; 1842, Outline Indian Localities, Rec p. 112.

The Panis (Wichitas) are located north of the Arkansas river on five maps, as follows: 1703, De l'Isle, Rec. p. 78; 1710, Senex, Rec. p. 79; 1715, Moll, Rec. p. 80; 1722, De l'Isle, Rec. p. 82; 1703, De l'Isle, Rec. p. 90.

The Paniassa (Wichitas?) are located north of the Arkansas river on twelve maps, as follows: 1703, De l'Isle, Rec. p. 78; 1710, Senex, Rec. p. 79; 1715, Moll, Rec. p. 80

1715, Moll, Rec. p. 81 ; 1741, De l'Isle, Rec. p. 82; 1722, De l'Isle, Rec. p. 82; 1735, Popple, Rec. p. 84; 1735, Popple, Rec. p. 84 ; 1778, Le Rouge, Rec. p. 86; 1737, Popple, Rec. p. 89; 1703, De l'Isle, Rec. p. 90; 1776, Mitchell, Rec. p. 126.

Twenty-seven different tribes of Indians were located between the Red and Arkansas rivers, at different times, on different maps, as follows, viz:

1. *Chacacants.* 1720, De l'Isle (Bernard), Rec. p. 86; 1737, Popple, Rec. p. 89; 1753, American Map, Rec. p. 86; 1759, Palairet, Rec. p. 105; 1776, Mitchell, Rec. p. 107; 1777, Jeffery, Rec. p. 107; 1778, Le Rouge, Rec. p. 108; 1794, Pownall, Rec. p. 108; 1778, Le Rouge, Rec. p. 118; 1776, Mitchell, Rec. p. 126.

2. *Quirreches.* 1753, American Map, Rec. p. 86; 1759, Palairet, Rec. p. 105; 1772, Bowen, Rec. p. 106; 1772, D'Amille, Rec. p. 106; 1777, Jeffery, Rec. p. 107; 1802, Robin, Rec. p. 109; 1815, Pinkerton, Rec. p. 110; 1778, Le Rouge, Rec. p. 108; 1776, Mitchell, Rec. p. 126.

3. *Quainco.* 1753, American Map, Rec. p. 86; 1720, De l'Isle (Bernard), Rec. p. 86; 1759, Palairet, Rec. p. 105; 1776, Mitchell, Rec. p. 126; 1777, Jeffery, Rec. p. 107; 1778, Le Rouge, Rec. p. 118; 1794, Pownall, Rec. p. 108; 1776, Mitchell, Rec. p. 126.

4. *Caniouis.* 1753, American Map, Rec. p. 86; 1759, Palairet, Rec. p. 105; 1776, Mitchell, Rec. p. 126; 1778; Le Rouge, Rec. p. 18.

5. *Paniassa.* 1753, American Map, p. 86; 1772, Bowen, Rec. p. 106; 1772, D'Amille, Rec. p. 106; 1794, Pownall, Rec. p. 108; 1776, Mitchell, Rec. p. 126; 1778, Le Rouge, Rec. p. 108.

6. *Osages.* 1778, Le Rouge, Rec. p. 108; 1737, De l'Isle (Bernard), Rec. p. 86, (Les Akensa).

7. *Mentous.* 1703, De l'Isle, Rec. p. 78; 1710, Senex,

Rec. p. 79; 1715, Moll, Rec. p. 80; 1772, Bowen, Rec. p. 106; 1772, D'Amille, Rec. p. 106; 1794, Pownall, Rec. p. 108.

8. *Taensas.* 1700, De l'Isle, Rec. p. 78; 1715, Moll, Rec. p. 81; 1733, De l'Isle, Rec. p. 83.

9. *Les Sitoue.* 1703, De l'Isle, Rec. p. 78.

10. *Cahenoua.* 1703, De l'Isle, Rec. p. 78; 1715, Moll, Rec. p. 81; 1759, Palairet, Rec. p. 105.

11. *Chaquanhe.* 1710, Senex, Rec. p. 79; 1720, De l'Isle, (Bernard) Rec. p. 91.

12. *Les Tongua.* 1703, De l'Isle, Rec. p. 78.

13. *Nassoni.* 1703, De l'Isle, Rec. p. 78; 1722, De l'Isle, Rec. p. 91; 1733, De l'Isle, Rec. p. 83.

14. *Wihaias.* 1703, De l'Isle, Rec. p. 78.

15. *Nihata.* 1710, Senex, Rec. p. 79; 1715, Moll, Rec. p. 81; 1737, Popple, Rec. p. 89; 1733, De l'Isle, Rec. p. 83.

16. *Chicantesou.* 1735, Popple, Rec. p. 84; 1720, De l'Isle, Rec. p. 91; 1737, Popple, Rec. p. 89.

17. *Ouanihinan.* 1735, Popple, Rec. p. 84; 1720, De l'Isle, Rec. p. 91; 1737, Popple, Rec. p. 89.

18. *Comanches.* (Tetans) 1823, Dirwald, Rec. p. 111; 1836, Young, Rec. p. 114; 1841, Kennedy, Rec. p. 16.

19. *Kio-hu-ha-has.* 1777, Jeffery, Rec. p. 107; 1794, Pownall Rec. p. 108.

20. *Canicous.* 1794–8, De Lozieres, Rec. p. 109.

21. *Kansas Hunting Grounds.* 1815, Pinkerton, Rec. p. 110.

22. *Nabici.* 1735, Popple, Rec. p. 84; 1720, De l'Isle, Rec. p. 91; 1737, Popple, Rec. p. 89.

23. *Pawnee Hunting Grounds.* 1815, Pinkerton, Rec. p. 110.

24. *Genaiches.* 1735, Popple, Rec. p. 84; 1737, Popple, Rec. p. 89.

25. *Cancatinos.* 1815, Pinkerton, Rec. p. 110.

26. *Nadsoos.* 1772, D'Amille, Rec. p. 106; 1776, Mitchell, Rec. p. 126; 1778, Le Rouge, Rec. p. 108; 1794, Pownall, Rec. p. 108; 1778, Le Rouge, Rec. p. 108; 1776, Mitchell, Rec. p. 126.

27. *Canessis.* 1759, Palairet, Rec. p. 105; 1772, Bowen, Rec. p. 106; 1772, D'Amille, Rec. p. 106; 1777, Jeffery, Rec. p. 107; 1794, Pownall, Rec. p. 108; 1815, Pinkerton, Rec. p. 110; 1778, Le Rouge, Rec. p. 108; 1776, Mitchell, Rec. p. 126.

The Caddos to whose family the Wichitas claim to belong are located in southwestern Arkansas, northwestern Louisiana and northeastern Texas on thirty-two different maps as follows: 1700, De l'Isle, Rec. p. 78; 1703, De l'Isle, Rec. p. 78; 1710, Senex, Rec. p. 79; 1715, Moll, Rec. p. 80; 1715, Moll, Rec. p. 81; 1722, De l'Isle, Rec. p. 82; 1733, De l'Isle, Rec. p. 83; 1746, Boehme, Rec. p. 85; 1703, De l'Isle Rec. p. 90; 1720, De l'Isle (Bernard) Rec. p. 91; 1741, Popple, Rec. p. 104; 1755, Old American Map, Rec. p. 104; 1759, Palairet, Rec. p. 105; 1761, Roque, Rec. p. 105; 1772, Bowen, Rec. p. 106; 1772, D'Amille, Rec. p. 106; 1776, Mitchell, Rec. p. 126; 1777, Jeffery, Rec. p. 107; 1778, Le Rouge, Rec. p. 108; 1794, Pownal, Rec. p. 108; 1794–8, De Loziers, Rec. p. 109; 1812, Arrowsmith and Lewis, Rec. p. 110; 1815, Pinkerton, Rec. p. 110; 1818, Melish, Rec. p. 111; 1823, Dirwald, Rec. p. 111; 1833, Outline Indian Localities Rec. p. 112; 1836, Lee, Rec. p. 113; 1839, Hunt and Randel, Rec. p. 115; 1839, Outline Hunt and Randel, Rec. p. 115; 1823, Melish Rec. p. 117; 1778, Le Rouge Rec. p. 118; Darby, Rec. p. 123.

HALBERT E. PAINE,
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FEB 27 1900
JAMES H. McKENNEY,
Clerk.

United States Supreme Court.

OCTOBER TERM, 1899.

Filed Feb. 27, 1900.

No. 337.

UNITED STATES vs. CHOCTAW NATION ET AL.

No. 338.

WICHITA BAND ET AL. vs. UNITED STATES ET AL.

No. 339.

CHOCTAW NATION ET AL. vs. UNITED STATES ET AL.

APPENDIX TO RECORD.

Printed for the Convenience of the Supreme Court.

Motion Allowed by Court of Claims, December 30, 1899.

The claimants move the Court of Claims for leave to withdraw from the files the ninety-eight documentary proofs, which were excluded from the record transmitted to the Supreme Court, and to print them, at the claimants' cost, for the convenience of the Supreme Court. The following are the grounds of this motion:

1. It will not be practicable, either for the claimants to produce, or for the Supreme Court to examine, on the trial, the ninety-eight publications which contain said proofs, many of which are bulky volumes.

2. It will be inconvenient for the Justices themselves to procure these publications, in order to "take judicial notice" of said proofs.

J. M. WILSON,
GEO. T. BARNES,
Attys. for Choctaws.

Answer, C. C. N.

H. E. PAINE,
Atty. for Chickasaws.

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United States Supreme Court.

OCTOBER TERM, 1899.

No. 337.

UNITED STATES *v.* CHOCTAW NATION ET AL.

No. 338.

WICHITA BAND ET AL. *v.* UNITED STATES ET AL.

No. 339.

CHOCTAW NATION ET AL. *v.* UNITED STATES ET AL.

APPENDIX TO RECORD.

I.—JURISDICTIONAL ACT.

No. 1. An act of Congress approved March 2, 1895, entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30, 1896; and for other purposes."

That, as the Choctaw and Chickasaw Nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, which claim is controverted by the United States, jurisdiction be, and is hereby, conferred upon the Court of Claims to hear and determine the said claim of the Choctaws and Chickasaws, and to render judgment thereon, it being the intention of this act to allow said Court of Claims jurisdiction, so that the

rights, legal and equitable, of the United States and the Choctaw and Chickasaw Nations, and the Wichita and affiliated bands of Indians in the premises, shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party in the hearing of said claim; and the Attorney-General is hereby directed to appear in behalf of the Government of the United States, and either of the parties to said action shall have the right of appeal to the Supreme Court of the United States: *Provided*, That such appeal shall be taken within sixty days after the rendition of the judgment objected to, and that the said courts shall give such causes precedence: *And provided further*, That nothing in this act shall be accepted or construed as a confession that the United States admit that the Choctaw and Chickasaw Nations have any claim to or interest in said lands, or any part thereof.

That said action shall be presented by a single petition, making the United States and the Wichita and affiliated bands of Indians parties defendant, and shall set forth all the facts on which the said Choctaw and Chickasaw Nations claim title to said land; and said petition may be verified by the authorized delegates, agents, or attorney of said nations upon information and belief as to the existence of such facts, and no other statement or verification shall be necessary: *Provided*, That if said Choctaw and Chickasaw Nations do not bring their action within ninety days from the approval of this act, their claim shall be forever barred: *And provided further*, That it shall be the duty of the Attorney-General of the United States, within ten days after the filing of said petition, to give notice to said Wichitas and affiliated bands, through the agents, delegates, attorneys, or other representatives of said bands, that said bands are made defend-

ants in said suit, of the purpose of said suit, that they are required to make answer to said petition, and that Congress has, in accordance with article five of said agreement, adopted this method of determining their compensation, if any. And the answer of the Wichitas and affiliated bands shall state the facts on which they rely for compensation, and may be verified by their agents, delegates, attorneys, or other representatives, upon their information and belief as to the existence of such facts, and no other statement or verification shall be necessary: *And provided also*, That said Wichitas and affiliated bands shall file their answer in said suit within sixty days after they shall receive from the Attorney-General of the United States the notice herein provided for, unless further time is granted by the court, and in the event of failure to answer they may be barred from all claim in the premises aforesaid.

The said Court of Claims shall receive and consider as evidence in the suit everything which shall be deemed by said court necessary to aid it in determining the questions presented, and tending to shed light on the claim, rights, and equities of the parties litigant, and issue rules on any department of the Government therefor if necessary.

It is hereby further provided that said Choctaw and Chickasaw Nations may, at any time before the rendition of final judgment in said case by the Court of Claims, negotiate with the commissioners appointed under section sixteen of the act of Congress approved the third day of March, eighteen hundred and ninety-three (Twenty-seventh Statutes, page six hundred and forty-five), or with any successor or successors in said commission, for the settlement of the said matters involved in said suit, and move the suspension of such action until such negotiations shall

be accepted or rejected by Congress, such settlement, however, to be made with the concurrence of the Secretary of the Interior and Attorney-General of the United States. 28 Stat. 898.

II.—TREATIES.

No. 2. Treaty of November 28, 1785, between the United States and the Cherokee Nation.

Art. 4. The boundary allotted to the Cherokees, for their hunting grounds, between the said Indians and the citizens of the United States, within the limits of the United States of America, is and shall be the following, viz. * * * 7 Stat. 18.

In Worcester *v.* Georgia, 6 Pet. 515, it was contended that the use of the word "allotted" implied that the United States had previously owned the lands within the allotted boundary, and by the treaty conveyed them to the Indians. But the court said:

The language, used in treaties with the Indians, should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. To contend that the word '*allotted*,' in reference to the land guarantied to the Indians in certain treaties, indicates a favor conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

No. 3. Treaty of January 3, 1786, between the United States and the Choctaw Nation.

Art. 3. The boundary of the lands hereby allotted to the Choctaw Nation, to live and hunt on within the limits of the United States of America, is and shall be the following, viz: Beginning at a point on the thirty-first degree of north latitude, where the Eastern boundary of the Natches district shall touch the same, thence east, along the said thirty-first degree of north latitude, being the southern boundary of the United States of America, until it shall strike the eastern boundary of the lands on which the Indians of the said nation did live and hunt, on the twenty-ninth of November, one thousand and seven hundred and eighty-two, while they were under the protection of the King of Great Britain; thence northerly, along the said eastern boundary, until it shall meet the northern boundary of the said lands; thence westerly, along the said northern boundary, until it shall meet the western boundary thereof; thence southerly, along the same, to the beginning; saving and reserving, for the establishment of trading posts, three tracts or parcels of land, of six miles square each, at such places as the United [States] in congress assembled shall think proper; which posts and the lands annexed to them shall be to the use and under the government of the United States of America. 7 Stat. 21.

No. 4. Treaty of January 10, 1786, between the United States and the Chickasaw Nation.

Art. 3. The boundary of the lands hereby allotted to the Chickasaw Nation, to live and hunt on, within the limits of the United States of America, is and shall be the following, viz: Beginning on the ridge that divides the waters

running into the Cumberland from those running into the Tennessee, at a point in a line to be run northeast, which shall strike the Tennessee at the mouth of Duck River; thence running westerly along the said ridge till it shall strike the Ohio; thence down the southern banks thereof to the Mississippi; thence down the same to the Choctaw line or Natches district; thence along the said line, or the line of the district, eastwardly as far as the Chickasaws claimed and lived and hunted, on the twenty-ninth of November, one thousand seven hundred and eighty-two. Thence the said boundary eastwardly shall be the lands allotted to the Choctaws and Cherokees, to live and hunt on, and the lands at present in the possession of the Creeks; saving and reserving, for the establishment of a trading post, a tract or parcel of land, to be laid out at the lower part of the Muscle Shoals, at the mouth of Ocochappo, in a circle, the diameter of which shall be five miles on the —— River, which post and the lands annexed thereto shall be to the use and under the government of the United States of America. 7 Stat. 24.

No. 5. Treaty of October 24, 1801, between the United States and the Chickasaw Nation.

Art. 1. The Mingco, principal men and warriors of the Chickasaw nation of Indians give leave and permission to the president of the United States of America, to lay out, open and make a convenient wagon-road, through their land, between the settlements of Mero district, in the State of Tennessee, and those of Natchez, in the Mississippi Territory, in such way and manner as he may deem proper; and the same shall be a highway for the citizens of the United States and the Chickasaws. 7 Stat. 65.

No. 6. Treaty of December 17, 1801, between the United States and the Choctaw Nation.

Art. 2. The Mingos, principal men and warriors of the Chactaw nation of Indians do hereby give their free consent that a convenient and durable wagon-way may be explored, marked, opened, and made, under the orders and instructions of the President of the United States, through their lands, to commence at the northern extremity of the settlements of the Mississippi Territory, and to be extended from thence, by such route as may be selected and surveyed, under the authority of the President of the United States, until it shall strike the lands claimed by the Chickasaw nation; and the same shall be and continue forever a high-way, for the citizens of the United States and the Choctaws. 7 Stat. 67.

No. 7. Treaty of October 17, 1802, between the United States and the Choctaw Nation.

Art. 2. The said line, when thus remarked and re-established, shall form the boundary between the United States and the said Choctaw nation, in that quarter. 7 Stat. 74.

No. 8. Treaty of April 30, 1803, between the United States and France.

Article 1. Whereas by the article the third of the treaty concluded at St. Ildelfonso the 9th Vendémiaire, an. 9 (1st October, 1800), between the First Consul of the French Republic and his Catholic Majesty, it was agreed as follows: 'His Catholic Majesty promises and engages on his part to cede to the French Republic, six months after the full and entire execution of the conditions and stipulations herein relative to His Royal Highness the

Duke of Parma, the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it; and such as it should be, after the treaties subsequently entered into between Spain and other states.' And whereas, in pursuance of the treaty, and particularly of the third article, the French Republic has an incontestible title to the domain and to the possession of the said territory: The First Consul of the French Republic, desiring to give to the United States a strong proof of his friendship, doth hereby cede to the said United States, in the name of the French Republic, forever, and in full sovereignty, the said territory, with all its rights and appurtenances, as fully and in the same manner as they have been acquired by the French Republic, in virtue of the above-mentioned treaty concluded with his Catholic Majesty. 8 Stat. 200.

No. 9. The treaty between the United States and the Quapaw tribe or nation, signed August 24, 1818, contains the following article:

Art. 2. The undersigned chiefs and warriors, for themselves and their said tribe or nation, do hereby, for, and in consideration of, the promises and stipulations hereinafter named, cede and relinquish to the United States, forever, all the lands within the following boundaries, viz: Beginning at the mouth of the Arkansaw river; thence, extending up the Arkansaw, to the Canadian fork, and up the Canadian fork to its source; thence south, to Big Red river, and down the middle of that river, to the Big Raft; thence, a direct line, so as to strike the Mississippi river, thirty leagues in a straight line, below the mouth of Arkansaw; together with all their claims to land east of the Mississippi, and north of the Arkansaw river, included

within the colored lines 1, 2, and 3, on the above map, with the exception and reservation following, that is to say: the tract of country bounded as follows: Beginning at a point on the Arkansaw river, opposite the present post of Arkansaw, and running thence, a due southwest course, to the Washita river; thence, up that river, to the Saline fork; and up the Saline fork to a point, from whence a due north course would strike the Arkansaw river at the Little Rock; and thence, down the right bank of the Arkansaw, to the place of beginning; which said tract of land, last above designated and reserved, shall be surveyed and marked off, at the expense of the United States, as soon as the same can be done with convenience, and shall not be sold or disposed of, by the said Quapaw tribe or nation, to any individual whatever, nor to any state or nation, without the approbation of the United States first had and obtained. 7 Stat. 176.

Prior to 1818, the leased district had always been considered the property of the Quapaws, not only by the former governments of the country, France and Spain, but also by the Osages, the neighbors of the Quapaws.

Letter of commissioners Clark and Chouteau, Sept. 1816; claimants' evidence in rebuttal, No. 162.

No. 10. Treaty of October 18, 1820, between the United States and the Choctaw Nation.

Preamble.

Whereas it is an important object, with the President of the United States, to promote the civilization of the Choctaw Indians by the establishment of schools amongst them; and to perpetuate them, as a nation, by exchang-

ing, for a small part of their land here, a country beyond the Mississippi River, where all, who live by hunting and will not work, may be collected and settled together.—And whereas it is desirable to the state of Mississippi to obtain a small part of the land belonging to said nation; for the mutual accommodation of the parties, and for securing the happiness and protection of the whole Choctaw nation, as well as preserving that harmony and friendship which so happily subsists between them and the United States, James Monroe, * * on the one part, and the Mingos * * of the Choctaw nation, * * on the other part, have freely and voluntarily entered into the following articles, viz:

Art. 1. To enable the President of the United States to carry into effect the above grand and humane objects, the Mingoes, Headmen and Warriors of the Choctaw nation, in full council assembled, in behalf of themselves and the said nation, do, by these presents, cede to the United States of America all the land lying and being within the boundaries following, to wit:—Beginning on the Choctaw boundary, east of Pearl River, at a point due south of the White Oak Spring, on the old Indian path; thence north to said spring; thence northwardly to a black oak standing on the Natchez road, about forty poles eastwardly from Doak's fence, marked A. J. and blazed, with two large pines and a black oak standing near thereto and marked as pointers; thence a straight line to the head of Black Creek or Bouge Loosa; thence down Black Creek or Bouge Loosa to a small lake; thence a direct course so as to strike the Mississippi one mile below the mouth of the Arkansas River; thence down the Mississippi to our boundary; thence around and along the same to the beginning.

Art. 2. For and in consideration of the foregoing ces-

sion on the part of the Choctaw nation, and in part satisfaction for the same, the Commissioners of the United States, in behalf of said States, do hereby cede to said nation a tract of country west of the Mississippi river, situate between the Arkansas and Red River, and bounded as follows:—Beginning on the Arkansas River, where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian Fork, and up the same to its source; thence due south to the Red River; thence down Red River three miles below the mouth of Little River, which empties itself into Red River, on the north side; thence a direct line to the beginning. 7 Stat. 210.

No. 11. Treaty of February 19, 1821, between the United States and Spain.

Article 3. The boundary line between the two countries west of the Mississippi shall begin on the Gulph of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river, to the 32d degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Nachitoches or Red River; then following the course of the Rio Roxo westward, to the degree of longitude 100 west from London and 23 from Washington; then crossing the said Red River and running thence, by a line due north, to the river Arkansas; thence following the course of the southern bank of the Arkansas to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818. But if the source of the Arkansas river shall be found to fall north or south of latitude 42, then the line shall run from the said source

due south or north, as the case may be, till it meets the said parallel of latitude 42, and thence, along the said parallel, to the South Sea: All the islands in the Sabine and the said Red and Arkansas rivers, throughout the course thus described, to belong to the United States; but the use of the waters and the navigation of the Sabine to the sea and of the said rivers Roxo and Arkansas, throughout the extent of the said boundary, on their respective banks, shall be common to the respective inhabitants of both nations.

The two high contracting parties agree to cede and renounce all their rights, claims and pretensions to the territories described by the said line; that is to say, the United States hereby cede to His Catholic Majesty and renounce forever all their rights, claims and pretensions to the territories lying west and south of the above described line; and, in like manner, His Catholic Majesty cedes to the said United States all his rights, claims and pretensions to any territories east and north of the said line; and, for himself, his heirs and successors, renounces all claim to the said territories forever. 8 Stat. 254.

No. 12. Treaty of January 20, 1825, between the United States and the Choctaw Nation.

Art. 1. The Choctaw Nation do hereby cede to the United States all that portion of the land ceded to them, by the second article of the treaty of Doak Stand, as aforesaid, lying east of a line beginning on the Arkansas, one hundred paces east of Forth Smith, and running thence due south to Red River; it being understood that this line shall constitute and remain the permanent boundary between the United States and the Choctaws; and the United States agreeing to remove such citizens, as may be

settled on the west side, to the east side of said line, and prevent future settlements from being made on the west thereof.

Art. 2. In consideration of the cession aforesaid, the United States do hereby agree to pay the said Choctaw Nation the sum of six thousand dollars annually forever. 7 Stat. 234, 235.

No. 13. Treaty of September 27, 1830, between the United States and the Choctaw Nation.

Art. 2. The United States, under a grant specially to be made by the President of the U. S., shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in fee simple, to them and their descendants, to enure to them while they shall exist as a nation and live on it; beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian Fork; if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeably to the treaty made and concluded at Washington City, in the year 1825 The grant to be executed so soon as the present treaty shall be ratified.

Art. 3. In consideration of the provisions contained in the several articles of this treaty, the Choctaw Nation of Indians consent and hereby cede to the United States the entire country they own and possess east of the Mississippi River; and they agree to remove beyond the Mississippi River early as practicable, and will so arrange their removal that as many as possible of their people, not exceeding one half of the whole number, shall depart

during the falls of 1831 and 1832; the residue to follo during the succeeding fall of 1833; a better opportuni in this manner will be afforded the Government to exte to them the facilities and comforts, which it is desirab should be extended in conveying them to their new hom

Art. 4. The Government and people of the Uni States are hereby obliged to secure to the said Choct Nation of Red People the jurisdiction and government all the persons and property, that may be within th limits west, so that no Territory, or State, shall ever ha a right to pass laws for the government of the Choct Nation of Red People and their descendants; and that part of the land granted them shall ever be embraced any Territory or State; but the U. S. shall forever sec said Choctaw Nation from and against all laws, exc such as, from time to time, may be enacted in their o National Councils, not inconsistent with the constituti treaties and laws of the United States; and except such may and which have been enacted by Congress, to the tent that Congress, under the constitution, are requir to exercise a legislation over Indian affairs. But t Choctaws, should this treaty be ratified, express a w that Congress may grant to the Choctaws the right punishing, by their own laws, any white man, who sh come into their nation and infringe any of their natio regulations. 7 Stat. 333, 334.

No. 14. Treaty of October 20, 1832, between the Uni States and the Chickasaw Nation.

The Chickasaw Nation find themselves oppressed their present situation, by being made subject to the l of the states in which they reside. Being ignorant the language and laws of the white man, they can

understand or obey them. Rather than submit to this great evil, they prefer to seek a home in the west, where they may live and be governed by their own laws. And believing that they can procure for themselves a home, in a country suited to their wants and condition, provided they had the means to contract and pay for the same, they have determined to sell their country and hunt a new home. The President has heard the complaints of the Chickasaws, and, like them, believes they cannot be happy and prosper, as a nation, in their present situation and condition, and being desirous to relieve them from the great calamity, that seems to await them, if they remain as they are, he has sent his Commissioner, Genl. John Coffee, who has met the whole Chickasaw Nation, in Council, and, after mature deliberation, they have entered into the following articles, which shall be binding on both parties, when the same shall be ratified by the President of the United States, by and with the advice and consent of the Senate.

Article 1. For the consideration hereinafter expressed, the Chickasaw Nation do hereby cede to the United States all the land which they own on the east side of the Mississippi River, including all the country where they at present live and occupy.

Art. 3. As a full compensation to the Chickasaw Nation for the country thus ceded, the United States agree to pay over to the Chickasaw Nation all the money arising from the sale of the land which may be received from time to time, after deducting therefrom the whole cost and expenses of surveying and selling the land, including every expense attending the same. 7 Stat. 381, 382.

No. 15. Treaty of May 24, 1834, between the United States and the Chickasaw Nation.

Art. 2. The Chickasaws are about to abandon t homes, which they have long cherished and loved; though hitherto unsuccessful, they still hope to fi country adequate to the wants and support of their ple, somewhere west of the Mississippi and within territorial limits of the United States; should they d the Government of the United States hereby conse protect and defend them against the inroads of any tribe of Indians and from the whites; and agree to them without the limits of any state or territory. Chickasaws pledge themselves never to make war any Indian people, or upon the whites, unless they a authorized by the United States. But if war be upon them, they will be permitted to defend themse until assistance be given to them by the United S as shall be the case. 7 Stat. 450.

No. 16. Treaty of August 24, 1835, with the Comanche, &c.

Article 1. There shall be perpetual peace and friendship between all the citizens of the United States of America, and all the individuals composing the Comanche and Witchetaw nations and their associated bands or tribes of Indians, and between these nations or tribes and the Cherokee, Muscogee, Choctaw, Osage, Seneca and Quapaw nations or tribes of Indians.

Article 2. Every injury or act of hostility by one or either of the contracting parties on the other, shall be mutually forgiven and forever forgot.

Treaty of May 26, with the Kioways, &c.

Article 1st. There shall petual peace and friendshi tween all the citizens of the States of America and all dividuals composing the K Ka-ta-ka, and Ta-wa-ka-ro and their associated bands o of Indians, and between nations or tribes and the Mu and Osage nations or tr Indians.

Article 2d. Every injury of hostility by one or either contracting parties on the shall be mutually forgive forever forgot.

Article 3. There shall be a free and friendly intercourse between all the contracting parties hereto, and it is distinctly understood and agreed by the Comanche and Witchetaw nations and their associated bands or tribes of Indians, that the citizens of the United States are freely permitted to pass and repass through their settlements or hunting ground without molestation or injury on their way to any of the provinces of the republic of Mexico, or returning therefrom, and that each of the nations or tribes named in this article, further agree to pay the full value for any injury their people may do to the goods or property of the citizens of the United States taken or destroyed, when peaceably passing through the country they inhabit, or hunt in, or elsewhere. And the United States hereby guaranty to any Indian or Indians of either of the said Comanche or Witchetaw nations, and their associated bands or tribes of Indians, a full indemnification for any horses or other property which may be stolen from them: Provided, that the property so stolen cannot be recovered, and that sufficient proof is produced that it was actually stolen by a citizen of the United States, and within the limits thereof.

Article 4. It is understood and agreed by all the nations or tribes of Indians parties to this treaty, that each and all of the said nations or tribes have free permission to hunt and trap in the Great Prairie

Article 3d. There shall be a free and friendly intercourse between all the contracting parties hereto; and it is distinctly understood and agreed by the Kioway, Ka-ta-ka, and Ta-wa-ka-ro nations, and their associated bands or tribes of Indians, that the citizens of the United States are freely permitted to pass and repass through their settlements or hunting ground without molestation or injury, on their way to any of the provinces of the republics of Mexico or Texas, or returning therefrom, and that the nations or tribes named in this article further agree to pay the full value of any injury their people may do to the goods or property of the citizens of the United States, taken or destroyed when peaceably passing through the country they inhabit, or hunt in, or elsewhere. And the United States hereby guaranty to any Indian or Indians of the Kioway, Ka-ta-ka, and Ta-wa-ka-ro nations, and their associated bands or tribes of Indians, a full indemnification for any horses or other property which may be stolen from them, provided that the property so stolen cannot be recovered, and that sufficient proof is produced that it was actually stolen by a citizen of the United States, and within the limits thereof.

Article 4th. It is understood and agreed by all the nations or tribes of Indians, parties to this treaty, that each and all of the said nations or tribes have free permission to hunt and trap in the Great

west of the Cross Timbers, to the western limits of the United States.

Article 5. The Comanche and Witchetaw nations and their associated bands or tribes of Indians, severally agree and bind themselves to pay full value for any injury their people may do to the goods or other property of such traders as the president of the United States may place near to their settlements or hunting ground for the purpose of trading with them.

Article 6. The Comanche and Witchetaw nations and their associated bands or tribes of Indians, agree, that in the event any of the red people belonging to the nations or tribes residing south of the Missouri river and west of the state of Missouri, not parties to this treaty, should visit their towns or be found on their hunting ground, that they will treat them with kindness and friendship and do no injury to them in any way whatever.

Article 7. Should any difficulty hereafter unfortunately arise between any of the nations or tribes of Indians parties hereunto, in consequence of murder, the stealing of horses, cattle, or other cause, it is agreed that the other tribes shall interpose their good offices to remove such difficulties, and also that the Government of the United States may take such measures as they may deem proper to effect the same object, and see that

Prairie west of the Cross Timbers to the western limits of the United States.

Article 5th. The Kioway, Ka-ta-ka, and Ta-wa-ka-ro nations and their associated bands or tribes of Indians agree and bind themselves to pay full value for any injury their people may do to the goods or other property of such traders as the president of the United States may place near to their settlements or hunting ground for the purpose of trading with them.

Article 6th. The Kioway, Ka-ta-ka and Ta-wa-ka-ro nations and their associated bands or tribes of Indians, agree, that in the event any of the red people belonging to the nations or tribes of Indians residing south of the Missouri river, and west of the states of Missouri and Arkansas, not parties to this treaty, should visit their towns, or be found on their hunting ground, that they will treat them with kindness and friendship, and do no injury to them in any way whatever.

Article 7th Should any difficulty hereafter unfortunately arise between any of the nations or tribes of Indians, parties hereunto, in consequence of murder, the stealing of horses, cattle, or any other cause, it is agreed that the other tribes shall interpose their good offices to remove such difficulties and also that the government of the United States may take such measures as they may deem proper to effect the same object, and see

full justice is done to the injured party.

Article 8. It is agreed by the commissioners of the United States, that in consequence of the Comanche and Witchetaw nations and their associated bands or tribes of Indians having freely and willingly entered into this treaty, and it being the first they have made with the United States or any of the contracting parties, that they shall receive presents immediately after signing, as a donation from the United States; nothing being asked from these nations or tribes in return, except to remain at peace with the parties hereto, which their own good and that of their posterity require.

Article 9. The Comanche and Witchetaw nations and their associated bands or tribes, of Indians, agree, that their entering into this treaty shall in no respect interrupt their friendly relations with the republic of Mexico, where they all frequently hunt and the Comanche nation principally inhabit; and it is distinctly understood that the government of the United States desire that perfect peace shall exist between the nations or tribes named in this article and the said republic.

Article 10. This treaty shall be obligatory on the nations or tribes parties hereto from and after the date hereof, and on the United States from and after its ratification by the government thereof.

that full justice is done to the injured party.

Article 8th. It is agreed by the commissioners of the United States that in consequence of the Kioway, Ka-ta-ka and Ta-wa-ka-ro nations and their associated bands or tribes of Indians having freely and willingly entered into this treaty, and it being the first they have made with the United States, or any of the contracting parties, that they shall receive presents immediately after signing, as a donation from the United States; nothing being asked from the said nations, or tribes, in return, except to remain at peace with the parties hereto, which their own good and that of their posterity require.

Article 9th. The Kioway, Ka-ta-ka and Ta-wa-ka-ro nations, and their associated bands or tribes of Indians, agree, that their entering into this treaty shall in no respect interrupt their friendly relations with the republics of Mexico and Texas, where they all frequently hunt and the Kioway, Ka-ta-ka and Ta-wa-ka-ro nations sometimes visit; and it is distinctly understood that the government of the United States desire that perfect peace shall exist between the nations or tribes named in this article, and the said republics.

Article 10th. This treaty shall be obligatory on the nations or tribes, parties hereto, from and after the date hereof, and on the United States from and after its ratification by the government thereof.

Done and signed and sealed at Camp Holmes on the eastern border of the Grand Prairie, near the Canadian river in the Muscogee nation, this twenty-fourth day of August, one thousand eight hundred and thirty-five, and of the independence of the United States the sixtieth. 7 Stat. 474, 475.

Done and signed and sealed at Fort Gibson, this twenty-sixth day of May, one thousand eight hundred and thirty-seven, and of the independence of the United States the sixty-second. 7 Stat. 533, 534, 535.

No. 17. The agreement of January 17, 1837, between the Choctaws and Chickasaws, contains the following provisions:

Article 1. It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country, to be held on the same terms that the Choctaws now hold it, except the right of disposing of it, which is held in common with the Choctaws and Chickasaws, to be called the Chickasaw district of the Choctaw nation, to have an equal representation in their general council, and to be placed on an equal footing, in every other respect, with any of the other districts of said nation, except a voice in the management of the consideration which is given for these rights and privileges; and the Chickasaw people to be entitled to all the rights and privileges of Choctaws, with the exception of participating in the Choctaw annuities, and the consideration to be paid for these rights and privileges, and to be subject to the same laws to which the Choctaws are; but the Chickasaws reserve to themselves the sole right and privilege of controlling and managing the residue of their funds, as far as is consistent with the late treaty between the said people and the government of the United States, and of making such regulations and electing such officers, for that purpose, as they may think proper.

Article 2. The Chickasaw district shall be bounded

as follows, viz: Beginning on the north bank of Red River, at the mouth of Island Bayou, about eight or ten miles below the mouth of False Wachitta; thence running north, along the main channel of said bayou, to its source; thence, along the dividing ridge, between the Wachitta and Low Blue rivers, to the road leading from Fort Gibson to Fort Wachitta; thence, along said road, to the line dividing Mushalatubbee and Pushmataha districts; thence, eastwardly, along said district line, to the source of Brushy creek; thence, down said creek to where it flows into the Canadian river, ten or twelve miles above the mouth of the south fork of the Canadian; thence west, along the main Canadian river to its source, if in the limits of the United States, or those limits; and thence due south to Red river, and down Red river to the beginning.

Article 5. It is hereby declared to be the intention of the parties hereto that equal rights and privileges shall pertain to both Choctaws and Chickasaws, to settle in whatever district they may think proper, and to be eligible to all the different offices of the Choctaw Nation, and to vote on the same terms in whatever district they may settle, except that the Choctaws are not to vote in anywise for officers in relation to the residue of the Chicksaw fund. 11 Stat. 573.

No. 18. Articles of a treaty made and concluded at Council Springs, in the county of Robinson, Texas, near the Brazos river, this 15th day of May, A. D. 1846, between P. M. Butler and M. G. Lewis, commissioners on the part of the United States of the one part, and the undersigned chiefs, counsellors, and warriors of the Comanche, I-on-i, Ana-da-ca, Cadoe, Lepan, Long-wha, Keechy,

Tah-wa-carro, Wichita, and Wacoe tribes of Indians and their associate bands in behalf of their said tribes, on the other part.

ARTICLE I.

The undersigned, chiefs, warriors, and counsellors, for themselves and their said tribes or nations, do hereby acknowledge themselves to be under the protection of the United States, and of no other power, State, or sovereignty whatever. * *

Given under our hands and seals this day and date above.

P. M. BUTLER,
M. G. LEWIS,
U. S. Com's.

Comanches. * * *

Wacoes. * * *

Keeches. * * *

Tonkaways. * * *

Wichetas.

To-sa-quash, White Tail. [his x mark.
Cho-wash-ta-ha-da, Runner, [his x mark.
Kow-wah, Shirt Tail, [his x mark.
Wich-qua-sa-is, Contrary, [his x mark.
His-si-da-wah, Stubborn, [his x mark.

Towa-karroes. * * *

Wacoes. * * *

9 Stat. 844.

No. 19. Treaty of February 2, 1848, between the United States and Mexico.

Article 5. The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence, up the middle of that river, following the deepest channel where it has more than one, to the point where it strikes the southern boundary of New Mexico; thence, westwardly, along the whole southern boundary of New Mexico (which runs north of the town called Paso), to its western termination; thence, northward, along the western line of New Mexico, until it intersects the first branch of the River Gila: (or, if it should not intersect any branch of that river, then to the point on the said line nearest to such branch, and thence, in a direct line, to the same:) thence down the middle of the said branch and of the said river, until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

The southern and western limits of New Mexico, mentioned in this article, are those laid down in the map entitled, "*Map of the United Mexican States, as organized and defined by various acts of the Congress of said Republic, and constructed according to the best authorities. Revised edition. Published at New York, in* 1847, *by J. Disturnell.*" Of which map a copy is added to this treaty, bearing the signatures and seals of the undersigned plenipotentiaries.

And, in order to preclude all difficulty in tracing, upon the ground, the limit separating Upper from Lower California, it is agreed that the said limit shall consist of

a straight line, drawn from the middle of the Rio Gila, where it unites with the Colorado, to a point on the coast of the Pacific Ocean, distant one marine league, due south of the southernmost point of the port of San Diego, according to the plan of said port made, in the year 1782, by Don Juan Pantoja, second sailing master of the Spanish fleet, and published at Madrid, in the year 1802, in the atlas to the voyage of the schooners Sutil and Mexicana, of which plan a copy is hereunto added, signed and sealed by the respective plenipotentiaries. 9 Stat. 926.

No. 20. Treaty of June 22, 1852, between the United States and the Chickasaw nation.

Art. 1. The Chickasaw tribe of Indians acknowledge themselves to be under the guardianship of the United States; and as a means of securing the protection guaranteed to them, by former treaties, it is agreed that an agent of the United States shall continue to reside among them.

No. 21. Treaty of June 22, 1855, between the United States and the Choctaw and Chickasaw Nations.

Whereas the political connection, heretofore existing between the Choctaw and Chickasaw tribes of Indians, has given rise to unhappy and injurious dissensions and controversies among them, which render necessary a readjustment of their relations to each other and to the United States; and whereas the United States desire that the Choctaw Indians shall relinquish all claim to any territory west of the one hundredth degree of west longitude, and also to make provision for the permanent settlement within the Choctaw country, of the Wichita and certain other tribes or bands of Indians, for which purpose the Choctaws and Chickasaws are willing to lease, on reason

able terms, to the United States that portion of their common territory which is west of the ninety-eighth degree of west longitude; and whereas the Choctaws contend that, by a just and fair construction of the treaty of September 27, 1830, they are of right entitled to the net proceeds of the lands ceded by them to the United States under said treaty, and have proposed that the question of their right to the same, together with the whole subject matter of their unsettled claims, whether national or individual, against the United States, arising under the various provisions of said treaty, shall be referred to the Senate of the United States for final adjudication and adjustment; and whereas it is necessary, for the simplification and better understanding of the relations between the United States and the Choctaw Indians, that all their subsisting treaty stipulations be embodied in one comprehensive instrument:

Now therefore the United States of America, by * * *, the Choctaws, by * * *, and the Chickasaws, by * * * do hereby agree and stipulate as follows, viz:

Art. 1. The following shall constitute and remain the boundaries of the Choctaw and Chickasaw country, viz: Beginning at a point on the Arkansas river, one hundred paces east of old Fort Smith, where the western boundary line of the state of Arkansas crosses the said river, and running thence due south to Red river; thence up Red river to the point where the meridian of one hundred degrees of west longitude crosses the same; thence north, along said meridian, to the main Canadian river; thence down said river to its junction with the Arkansas river; thence down said river to the place of beginning.

And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and

guaranty the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal undivided interest in the whole: Provided, however, no part thereof shall ever be sold without the consent of both tribes; and that said land shall revert to the United States, if said Indians and their heirs become extinct, or abandon the same.

Article 2. A district for the Chickasaws is hereby established, bounded as follows, to wit: Beginning on the north bank of Red river, at the mouth of Island Bayou, where it empties into Red river, about twenty-six miles on a straight line below the mouth of False Wachitta; thence running a northwesterly course, along the main channel of said bayou, to the junction of the three prongs of said bayou nearest the dividing ridge between Wachitta and Low Blue rivers, as laid down on Captain R. L. Hunter's map; thence northerly, along the eastern prong of Island Bayou, to its source; thence due north to the Canadian river; thence west along the main Canadian to the ninety-eighth degree of west longitude; thence south to Red river; and thence down Red river to the beginning: Provided, however, if the line running due north, from the eastern source of Island Bayou, to the main Canadian, shall not include Allen's or Wapanacka Academy, within the Chickasaw district, then an offset shall be made from said line, so as to leave said academy two miles within the Chickasaw district, north, west and south from the lines of boundary.

Article 3. The remainder of the country held in common by the Choctaws and Chickasaws shall constitute the Choctaw district, and their officers and people shall, at all times, have the right of safe conduct and free passage through the Chickasaw district.

Article 7. So far as may be compatible with the constitution of the United States, and the laws, made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property within their respective limits; excepting, however, all persons, with their property, who are not by birth, adoption, or otherwise, citizens or members of either the Choctaw or Chickasaw tribe; and all persons, not being citizens or members of either tribe, found within their limits, shall be considered intruders, and be removed from and kept out of the same by the United States Agent, assisted, if necessary, by the military, with the following exceptions, viz: Such individuals as are now or may be in the employment of the government and their families; those peacefully traveling, or temporarily sojourning in the country, or trading therein under license from the proper authority of the United States, and such as may be permitted, by the Choctaws and Chickasaws with the assent of the United States Agent, to reside within their limits, without becoming citizens or members of either of said tribes.

Article 9. The Choctaw Indians do hereby absolutely and forever quitclaim and relinquish to the United States all their right, title and interest in and to any and all lands west of the one hundredth degree of west longitude; and the Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude, for the permanent settlement of the Wichita and such other tribes or bands of Indians as the government may desire to locate therein, excluding, however, all the Indians of New Mexico and also those whose usual ranges at present are north of the Arkansas river, and whose

permanent locations are north of the Canadian river, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas, which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may, from time to time, be prescribed by the President for their government, provided however the territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore.

Article 10. In consideration of the foregoing relinquishment and lease, and as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct. 11 Stat. 611, 612, 613.

No. 22. Instructions to Commissioner Chouteau,—April 7, 1837.

It has been further stated that the Comanches are dissatisfied because the Creeks and Choctaws have extended their occupation and improvements to the country heretofore used by themselves as hunting grounds. This matter should be explained to them, so that they may *understand that the United States having purchased these lands from the tribes* possessing the occupant title, *has guaranteed the exclusive right* in it to the emigrant Indians. They cannot therefore be permitted to hunt upon it, after the latter are prepared to settle upon and cultivate it. Report of Commissioner, Dec. 1, 1837. Also Letter Book Ind. Off., No. 21, April 7, 1837.

No. 23. On the twenty-third of March, 1842, a patent for the land described in the second article of said treaty, including the land in controversy, and the rest of the "leased district," was issued by the United States to the Choctaw nation, in pursuance of the stipulation of the second article of said treaty, in the following words and figures:

To the United States of America, to all to whom these presents shall come, greeting:

Whereas, by the second article of the treaty began and held at Dancing Rabbit Creek on the fifteenth day of September, in the year of our Lord one thousand eight hundred and thirty (as ratified by the senate of the United States on the 24th day of February, 1831), by the commissioners on the part of the United States, and the mingoes, chiefs, captains, and warriors of the Choctaw nation, on the part of said nation, it is provided that "the United States, under a grant specially to be made by the president of the United States, shall cause to be conveyed to the Choctaw nation" a tract of country west of the Mississippi river, in fee simple, to them and their descendants, to inure to them while they shall exist as a nation, and live on it, beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas river, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red river and down Red river to the west boundary of the territory of Arkansas; thence north along that line to the beginning, the boundary of the same to be agreeably to the treaty made and concluded at Washington city in the year 1825:

Now, know ye that the United States of America, in consideration of the premises, and in execution of the agreement and stipulation in the aforesaid treaty, have

given and granted, and by these presents do give and grant, unto the said Choctaw nation the aforesaid "tract of country west of the Mississippi;" to have and to hold the same, with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, as intended "to be conveyed" by the aforesaid article, "in fee simple to them and their descendants, to inure to them, while they shall exist as a nation and live on it," liable to no transfer or alienation, except to the United States, or with their consent.

In testimony whereof, I, John Tyler, president of the United States of America, have caused these letters to be made patent, and seal of the general land office to be hereunto affixed. Given under my hand, at the city of Washington, the twenty-third day of March, in the year of our Lord one thousand eight hundred and forty-two, and of the independence of the United States the sixty-sixth.

By the president:

JOHN TYLER,
DAN'L WEBSTER,
Secretary of State.
JOHN C. SPENCER,
Secretary of War.
T. HARTLEY CRAWFORD,
Commissioner of Indian Affairs.

No. 24. Treaty of April 28, 1866, between the United States and the Choctaw and Chickasaw nations.

Article 3. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, provided that the said sum shall be invested and held by the United

States at an interest not less than five per cent., in trust for the said nations until the legislatures of the Choctaw and Chickasaw nations, respectively, shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by or belonging to said nations, respectively, and also to give to such persons who are residents, as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided, and immediately on the enactment of such laws, rules, and regulations the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter, less such sum, at the rate of one hundred dollars *per capita*, as shall be sufficient to pay such persons of African descent before referred to as, within ninety days after the passage of such laws, rules, and regulations, shall elect to remove, and actually remove, from the said nations respectively. And should the said laws, rules, and regulations not be made by the legislatures of the said nations, respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such

manner as the United States shall deem proper, the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove, those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations.

Article 4. The said nations further agree that all negroes not otherwise disqualified or disabled shall be competent witnesses in all civil and criminal suits and proceedings in the Choctaw and Chickasaw courts, any law to the contrary notwithstanding; and they fully recognize the right of the freedmen to a fair remuneration on reasonable and equitable contracts for their labor, which the law should aid them to enforce. And they agree, on the part of their respective nations, that all laws shall be equal in their operation upon Choctaws, Chickasaws, and negroes, and that no distinction affecting the latter shall at any time be made, and that they shall be treated with kindness and be protected against injury; and they further agree that while the said freedmen now in the Choctaw and Chickasaw nations remain in said nations, respectively, they shall be entitled to as much land as they may cultivate for the support of themselves and families, in cases where they do not support themselves and families by hiring, not interfering with existing improvements without the consent of the occupant, it being understood that in the event of the making of the laws, rules, and regulations aforesaid, the forty acres aforesaid shall stand in place of the land cultivated as last aforesaid.

Article 10. The United States reaffirms all obligations arising out of treaty stipulations or acts of legislation with

regard to the Choctaw and Chickasaw nations, entered into prior to the late rebellion, and in force at that time, not inconsisetnt herewith; and further agrees to renew the payment of all annuities and other moneys accruing under such treaty stipulations and acts of legislation from and after the close of the fiscal year ending on the thirtieth of June, in the year eighteen hundred and sixty-six.

Article 11. * * Should the Choctaw and Chickasaw people, through their respective legislative councils, agree to the survey and dividing their land, on the system of the United States, the land aforesaid, east of the 98th degree of west longitude, shall be, in view of the arrangements hereinafter mentioned, surveyed, and laid off in ranges, townships, sections and parts of sections; * *

Article 12. The maps of said surveys shall exhibit, as far as practicable, the outlines of the actual occupancy of members of the said nations, respectively, and when they are completed, shall be returned to the said land office, at Boggy Depot, for inspection by all parties interested, when notice for ninety days shall be given of such return. * *

Article 15. At the expiration of the ninety days' notice aforesaid, the selection, which is to change the tenure of the land, in the Choctaw and Chickasaw nations, from a holding in common, to a holding in severalty, shall take place, when every Choctaw and Chickasaw shall have the right to one quarter section of land. * *

Article 25. During ninety days from the expiration of the ninety days' notice aforesaid, the Choctaws and Chickasaws shall have the exclusive right to make selections, as aforesaid. * *

Article 30. The Choctaw and Chickasaw nations will receive into their respective districts, east of the ninety-

eighth degree of west longitude, in the proportion of one-fourth in the Chickasaw and three-fourths in the Choctaw Nation, civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory, not exceeding ten thousand in number, who shall have in the Choctaw and Chickasaw nations, respectively, the same rights as the Choctaws and Chickasaws, of whom they shall be the fellow-citizens, governed by the same laws and enjoying the same privileges, with the exception of the right to participate in the Choctaw and Chickasaw annuities and other moneys, and in the public domain, should the same, or the proceeds thereof, be divided *per capita* among said Choctaws and Chickasaws, and among others the right to select land as herein provided for Choctaws and Chickasaws, after the expiration of the ninety days during which the selections of land are to be made, as aforesaid, by said Choctaws and Chickasaws; and the Choctaw and Chickasaw nations pledge themselves to treat the said Kansas Indians in all respects with kindness and forbearance, aiding them in good faith to establish themselves in their new homes, and to respect all their customs and usages not inconsistent with the constitution and laws of the Choctaw and Chickasaw nations respectively. In making selections after the advent of the Indians and the actual occupancy of land in said nation, such occupancy shall have the same effect in their behalf as the occupancies of Choctaws and Chickasaws; and after the said Choctaws and Chickasaws have made their selections as aforesaid, the said persons of African descent mentioned in the third article of the treaty shall make their selections as therein provided, in the event of the making of the laws, rules, and regulations aforesaid, after the expiration of ninety days from the date at which the Kansas Indians are to make their selections

in provided, and the actual occupancy of such of African descent shall have the same effect in half as the occupancies of the Choctaws and aws.

e 31. And whereas some time must necessarily efore the surveys, maps, and selections, herein for, can be completed, so as to permit the said Indians to make their selections, in their order, hich time the United States may desire to remove Indians, from their present abiding places, it is greed that the said Indians may at once come Choctaw and Chickasaw nations, settling themmporarily as citizens of the said nations, respecpon such land as suits them and is not already

e 37. In consideration of the right of selection, fore accorded to certain Indians other than the s and Chickasaws, the United States agree to pay hoctaw and Chickasaw nations, out of the funds ns removing into said nations, respectively, under isions of this treaty, such sum as may be fixed by latures of said nations, not exceeding one dollar

* *

le) 43. The United States promise and agree that no rson, except officers, agents and employes of the ent, and of any internal improvement company, ns traveling through, or temporarily sojourning, id nations, or either of them, shall be permitted o said territory, unless formally incorporated and ed, by the joint action of the authorities of both into one of the said nations of Choctaws and aws, according to their laws, customs, or usages; article is not to be construed to affect parties re adopted, or to prevent the employment, tem-

porarily, of white persons, who are teachers, mechanics, or skilled in agriculture, or to prevent the legislative authorities of the respective nations from authorizing such works of internal improvement as they may deem essential to the welfare and prosperity of the community, or be taken to interfere with, or invalidate, any action which has heretofore been had, in this connection, by either of the said nations.

Art.(icle) 45. All the rights, privileges, and immunities heretofore possessed by said nations, or individuals thereof, or to which they were entitled under the treaties and legislation heretofore made and had in connection with them, shall be, and are hereby declared to be, in full force, so far as they are consistent with the provisions of this treaty.

Art.(icle) 46. Of the moneys stipulated to be paid to the Choctaws and Chickasaws under this treaty for the cession of the leased district, and the admission of the Kansas Indians among them, the sum of one hundred and fifty thousand dollars shall be advanced and paid to the Choctaws, and fifty thousand dollars to the Chickasaws, through their respective treasurers, as soon as practicable after the ratification of this treaty, to be repaid out of said moneys or any other moneys of said nations in the hands of the United States; the residue, not affected by any provision of this treaty, to remain in the treasury of the United States at an annual interest of not less than five per cent., no part of which shall be paid out as annuity, but shall be annually paid to the treasurer of said nations, respectively, to be regularly and judiciously applied, under the direction of their respective legislative councils, to the support of their government, the purposes of education, and such other objects as may be best calculated to promote and advance the welfare and happiness of said nations and their people respectively. 14 Stat. 769.

No. 25. Creek treaty of June 14, 1866.

Art. 3. In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain, * * * and in consideration of said cession of the west half of their lands, estimated to contain 3,250,560 acres, the United States agree to pay the sum of 30 cents per acre, amounting to 975,168 dollars. * * 14 Stat. 785.

Seminole treaty of March 21, 1866.

Art. 3. In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Seminoles cede and convey to the United States their entire domain. * * In considerationof said grant and cession of their lands, estimated at 2,169,080 acres, the United States agree to pay said Seminole Nation, the sum of three hundred and twenty-five thousand three hundred and sixty-two ($325,362) dollars, said purchase being at the rate of 15 cents per acre. 14 Stat. 756.

No. 26. Delaware treaty of July 4, 1866.

Whereas, Congress has by law made it the duty of the President of the United States to provide by treaty for the removal of the Indian tribes from the State of Kansas, and whereas the Delaware Indians have expressed a wish to remove from their present reservation in said State to the Indian country, located between the States of Kansas and Texas, and whereas the United States have by treaties negotiated with the Choctaws and Chickasaws, with the Creeks and with the Seminoles, Indian tribes residing in

said country, acquired the right to locate other Indian tribes within the limits of the same, * * *

Article 4. The United States agree to sell to the said Delaware Indians a tract of land ceded to the Government by the Choctaws and Chickasaws, the Creeks or the Seminoles, or which may be ceded by the Cherokees in the Indian country to be selected by the Delawares. * * 14 Stat. 793.

No. 27.

42d Congress, 3d Session. | HOUSE OF REPRESENTATIVES. | Ex. Doc. No. 65.

AGREEMENT WITH WICHITAS AND OTHER INDIANS.

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* * * * * * *

Articles of agreement made and concluded at Washington City, District of Columbia, this nineteenth day of October, A. D. 1872, by and between Francis A. Walker, Commissioner of Indian Affairs, representing the United States, of the one part, and the undersigned chiefs, headmen, and members of the Wichitas and other affiliated bands of Indians duly authorized to act for their people, of the other part, witnesseth:

Article 1. The United States hereby give and grant to the said Wichitas and other affiliated bands, for a home, the tract of country bounded as follows, to wit: Commencing at a point in the middle of the main channel of the Washita River, where the 98th meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the line of 98° 40′ west longitude, thence on said line of 98° 40′ due north to the middle of the main channel of the main Canadian River,

thence down the middle of said main Canadian River, to where it crosses the 98th meridian, thence due south to the place of beginning.

Art. 2. In consideration of the reservation provided for in the preceding article, the said Wichitas and other affiliated bands hereby cede and relinquish to the United States all right, title, interest, or claim of any nature whatsoever in and to any lands in Texas, Louisiana, Indian Territory, or elsewhere within the limits of the United States.

In testimony whereof the parties to this agreement have hereunto subscribed their names and affixed their seals on the day and year first above written.

FRANCIS A. WALKER,
Commissioner Indian Affairs,
Party of the first part.

ESSADUA, his x mark,
Head Chief of the Wichitas,

ESQUITZCHEW, his x mark,
Delegate for Wichitas,

NAR-TACH-SIS, his x mark,
Delegate for Wichitas,

GEORGE WASHINGTON, his x mark,

WAR-LOO-PEE, (Guadaloupe,) his x mark,
Chiefs of Caddoes,

ANTELOPE, his x mark,
Delegate for Caddoes,

DAVE, his x mark,
Chief of the Towoccaroes,

LONG SOLDIER, his x mark,
Delegate for the Wacoes,

RISING SUN, his x mark,
Chief of the Keechies,
Parties of the second part.

Witnesses:

HENRY E. ALVORD,
United States Special Commissioner.

PHILIP MCCOSKER,
United States Interpreter.

J. J. STURM,
United States Interpreter.

BLACK BEAVER, his x mark,
Delaware Indian.

Witness to mark:
H. E. A.

III.—LEGISLATION.

No. 28. Act of Congress of May 28, 1830.

Be it enacted, &c., That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States west of the River Mississippi, not included in any State or organized Territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside and move there, and to cause each of said districts to be so described, by natural or artificial marks, as to be easily distinguished from every other.

2. *And be it further enacted*, That it shall and may be lawful for the President to exchange any or all of such districts, so to be laid off and described, with any tribe or nation of Indians now residing within the limits of any of the States or Territories, and with which the United States have existing treaties, for the whole or any part of

portion of the territory claimed and occupied by such tribe or nation, within the bounds of any one or more of the States or Territories, where the land claimed and occupied by the Indians is owned by the United States, or the United States are bound to the State within which it lies to extinguish the Indian claim thereto.

3. *And be it further enacted*, That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided, always*, That such lands shall revert to the United States if the Indians become extinct or abandon the same. 4 Stat. 411.

No. 29. An act of the Chickasaw legislature, approved November 18, 1865, contains the following provision:

SEC. 1. Be it enacted by the legislature of the Chickasaw nation, That the governor of the Chickasaw nation be, and he is hereby, requested and authorized to appoint and commission three competent persons, by and with the advice and consent of the senate, as delegates to visit Washington city, during the next session of congress, with full and efficient powers to reconstruct, or enter into, new treaties, or conventions, with the United States of America.

No. 30. Congress has expressly acknowledged this trust. The act approved March 3, 1891 (26 Stat. 1025), contains the following clause:

Said lands have been ceded in trust by article three of the treaty between the United States and the said Choctaw and Chickasaw nations of Indians, which was concluded April 28, 1866, and proclaimed on the 10th day of August of the same year.

No. 31. Act of the Choctaw Council, approved December 21, 1866.

Whereas, the Senate of the United States did, on the 28th day of June, A. D. 1866, advise and consent to the ratification of the articles of agreement and convention between the United States and the Choctaw and Chickasaw commissioners, and the same having been confirmed by the President of the United States on the 10th day of July following; and

Whereas, the same having been submitted to the general council of the Choctaw Nation, and having been interpreted and fully explained; therefore,

SECTION 1. *Be it enacted by the general council of the Choctaw Nation assembled*, That the report of the Choctaw commissioners and all their acts respecting the negotiations of the late treaty made and concluded at Washington city between the United States and the Choctaw and Chickasaw nations of Indians be, and the same is hereby, received and approved.

SEC. 2. *Be it further enacted*, That the propositions contained in the 3d and 8th articles of said treaty are hereby deferred until the next regular session of the general council, and the 11th and 47th articles are hereby referred to the people at large, to be declared through their legal representatives in council at the October session, A. D. 1867, and the principal chief is hereby required to issue his proclamation, when he shall think expedient, calling the votes of the people, the specified article above.

SEC. 3. *Be it further enacted*, That this act take effect and be in force from and after its passage. Choctaw Laws, Ed. 1869, pp. 450, 451.

No. 32. Act of the Chickasaw legislature approved November 9, 1866.

SECTION 1. *Be it enacted by the legislature of the Chickasaw Nation*, That whereas a treaty was concluded at Washington city on the 28th of April, 1866, by commissioners duly appointed on the part of the Chickasaws, Choctaws, and the United States Government, which treaty was ratified with amendments by the United States Senate and confirmed by the President, the Chickasaw legislature does hereby give its assent and confirm the said treaty and its amendments made by the Senate of the United States.

SEC. 2. *Be it further enacted*, That the Chickasaw legislature does hereby give its assent to the sectionizing and allotment of the lands in severalty, under the system of the United States, as is provided for in the treaty of April, 1866, and the President of the United States is hereby requested to cause the same to be done as soon as may be practicable.

SEC. 3. *Be it further enacted*, That the provisions contained in article 3d of the said treaty, giving the Chickasaw legislature the choice of receiving and appropriating the three hundred thousand dollars therein named for the use and benefit of the Chickasaws, or passing such laws, rules, and regulations, as will give all persons of African descent, certain rights and privileges, be, and it is hereby, declared to be, the unanimous consent of the Chickasaw legislature, that the United States shall keep and hold said sum of three hundred thousand dollars for the benefit of the said negroes. And the governor of the Chickasaw

nation is hereby requested to notify the Government of the United States, that it is the wish of the legislature of the Chickasaw nation, that the Government of the United States remove the said negroes beyond the limits of the Chickasaw nation, according to the requirements of the 3d article of the treaty of April 28, 1866. Chickasaw Const. and Laws, 1866.

No. 33. The constitution of the Choctaw Nation contains the following provisions:

For the convenience and good government of the people of the Choctaw Nation we do make, ordain and establish four districts, in this nation, to be known by the following names and boundaries, viz: Mosholatubbe district, Pushamataha district, Apuckshunnubbe district, and Hotubbe district. * * *

The boundaries of Hotubbe district shall be embraced within the limits of the ninety-eighth and one hundredth degree of west longitude, and between Red river and Canadian river, known as leased land.

ARTICLE 4—JUDICIAL DEPARTMENT.

Until Hotubbe district shall be duly organized and officers elected therein, under this constitution the supreme court shall be composed of three supreme judges, one to be chosen from the Apuckshunnubbe district, one from the Pushamataha district, and one from the Mosholatubbe district, one of whom shall be styled chief justice, and two of whom shall constitute a quorum to do business.

ARTICLE 7—GENERAL PROVISIONS.

SECTION 1. Until Hotubbe district shall be duly organized the principal chief of the Choctaw Nation shall ex-

ercise such authority over the citizens of the nation living in that district as he may deem expedient for the protection of person, life, and property. Choctaw Laws, 1869; Constitution of 1861, pp. 7, 8, and 13.

No. 34. The 15th section of the act of congress approved March 3, 1891, 26 Stat. 1025, contains the following provision:

And the sum of two million nine hundred and ninety-one thousand four hundred and fifty dollars be and the same is hereby appropriated, out of any money in the treasury not otherwise appropriated, to pay the Choctaw and Chickasaw nations of Indians for all the right, title, interest, and claim, which said nations of Indians may have in and to certain lands now occupied by the Cheyenne and Arapahoe Indians under executive order; said lands lying south of the Canadian river, and now occupied by the Cheyenne and Arapahoe Indians; said lands have been ceded in trust, by article three of the treaty between the United States and the said Choctaw and Chickasaw nations of Indians, which was concluded April 28, 1866, and proclaimed on the 10th day of August of the same year.

For more than a quarter of a century the government had invariably held the cession of 1866 to be a cession in trust, when President Harrison, on the 18th of February, 1892, sent a message to congress, giving his reasons for delaying the payment of the money appropriated by the act of March 3, 1891, and expressing the opinion that the treaty had invested the United States with the absolute beneficial ownership of the land. This message was referred to the committee on Indian affairs, in each house of congress. The senate committee submitted Senate Report No. 552, 52d Congress, 1st session, and with the report the following resolution:

Resolved, That for reasons set forth in the report of the Committee on Indian Affairs upon the president's message of February 18, 1892, upon the appropriation of March 3, 1891, for payment to the Choctaw and Chickasaw nations for their interest in the Cheyenne and Arapahoe reservation, in the Indian Territory, submitted with this resolution, that it is the opinion of the Senate that there is no sufficient reason for interference in the due execution of the law referred to.

The debate commenced April 27, 1892; and on the 9th of May the senate came to a vote. An amendment was proposed as follows:

Provided, however, that, in the opinion of the senate, the president should require the leases and the conveyances, which shall be executed by the Choctaw and Chickasaw nations of Indians, mentioned in said appropriation, to contain a full and complete relinquishment of all the right, title, interest, and claim of said nations of Indians in and to all the lands between the 98th and 100th meridians of west longitude, formerly owned by them, and of all claim to reimbursement and compensation for and on account of the same.

This amendment was rejected by a vote of yeas 13, nays 41. The resolution was then adopted by a vote of yeas 43, nays 13. Cong. Rec. 52 Cong., 1st sess., p. 4093. The house of representatives by a vote of yeas 163, nays 47, adopted a resolution in the identical words of the senate resolution.

On the 17th of December, 1892, the house of representatives adopted the following resolution:

Resolved by the senate and house of representatives, that the secretary of the treasury be, and he is hereby, directed to retain and cover back into the treasury $48,800 of the appropriation made by congress, to pay

the Choctaw and Chickasaw tribes of Indians for their interest in land of the Cheyenne and Arapahoe reservation, dated March 3, 1891, which amount has been ascertained, by a recount of the allottees of the said Cheyennes and Arapahoes, to be, by that amount, more than is due the said Choctaws and Chickasaws, upon the purchase and settlement for their said interest.

The senate adopted the following amendment to this resolution, in which amendment the house concurred:

Provided, however, that neither the passage of the original act of appropriation to pay the Choctaw and Chickasaw tribes of Indians, for their interest in the lands of the Cheyenne and Arapahoe reservation, dated March 3d, 1891, nor of this resolution shall be held, in any way, to commit the government to the payment of any further sums to the Choctaw and Chickasaw Indians for any alleged interest in the remainder of the lands situate in what is commonly known and called the leased district.

IV.—JUDICIAL AUTHORITIES.

No. 35. In Russell *ex.* Southland, 12 Howard, 139, 147, the court said:

The question is whether this transaction was a mortgage or a sale. It is insisted on behalf of the defendants that this question is to be determined by inspection of the written papers alone, oral evidence not being admissible to contradict, vary or add to their contents. But we have no doubt extraneous evidence is admissible, to inform the court of every material fact known to the parties when the deed and memorandum were executed. This is clear both upon principle and authority.

In examining this question it is of great importance to inquire whether the consideration was adequate to induce a sale. Where no fraud is practiced and no inequitable advantages taken of pressing wants, owners of property do not sell it for a consideration manifestly inadequate, and therefore, in the cases on this subject great stress is justly laid upon the fact, that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold.

No. 36. In Peugh *vs.* Davis, 96 U. S. 336, the court said:

In equity, where the court acts on the real character of the transaction, any evidence written or oral tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument, has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the objects of the parties in executing or receiving the instrument. The object of the parties will be considered by a court of equity. It constitutes a ground for the exercise of its jurisdiction which will always be asserted to prevent fraud or oppression, and to promote justice.

No. 37. There has been considerable diversity of opinion, and much ingenious speculation on the claim of right to this country by the Europeans, founded on the title by discovery. We have seen that with respect to the English colonists in America, the claim was modified, and much of its extravagance destroyed by conceding to the native tribes, their political rights and privileges, as depend-

ent allies, and their qualified title to the soil. As far as Indian rights and territories were defined, and acknowledged by the whites by treaty, there was no question in the case, for the whites were bound by the moral and national obligations of contract, and good faith, and as far as Indian nations had formed themselves into regular organized governments, *within reasonable and definite limits*, necessary for the hunter state, there would seem to be no ground to deny the absolute nature of their territorial and political rights. But beyond these points our colonial ancestors were not willing to go. Kent's Comm. v. 3, p. 87.

No. 38. In Beecher *v.* Wetherby, 95 U. S. 517, 525, the court said:

But the right which the Indians held was *only that of occupancy. The fee was in the United States*, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that, in this matter, the United States would be governed by such considerations of justice as would control a christian people in their treatment of an ignorant and dependent race. Be that as it may, *the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties* neither of whom derives title from the Indians. *The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the Government.* It was so ruled in *Johnson* v. *McIntosh* (8 Wheat. 543),

in 1823, and in *United States* v. *Cook* (19 Wall. 591) in 1873. Other cases between those periods have affirmed the same doctrine. *Clark* v. *Smith* (13 Pet. 195). See, also, *Jackson* v. *Hudson* (3 Johns., N. Y., 375); *Veeder* v. *Guppy* (3 Wis. 502), and 8 Op. Atty. Genl., pp. 262-4. In *United States* v. *Cook*, the United States maintained replevin for timber cut and sold by Indians on land reserved to them, the court observing that the fee was in the United States, and only a right of occupancy in the Indians; that this was the title by which other Indians held their land, and that the authority of *Johnson* v. *McIntosh* on this point had never been doubted. . . . "The possession, when abandoned by the Indians, attaches itself to the fee without further grant."

No. 39. In Doe, Lessee of Poor, *v.* Considine, 6 Wall. 458, 461, the court said:

When a trust has been created, it is to be held large enough to enable the trustee to accomplish the objects of its creation. If a fee simple estate be necessary, it will be held to exist, though no words of limitation be found in the instrument, by which the title was passed to the trustee, and the estate created. On the other hand, it is equally well settled that, where no intention to the contrary appears, the language, used in the creation of the estate, will be limited and restrained to the purposes of its creation. And when they are satisfied, the estate of the trustee ceases to exist, and his title becomes extinct. The extent and duration of the estate are measured by the objects of its creation.

Jarman says: "Trustees take exactly the estate which the purposes of the trust require; and the question is not whether the testator has used words of limitation, or

expressions adequate to carry an estate of inheritance, but whether the exigencies of the trust demand the fee simple, or can be satisfied by any and what less estate."

Chancellor Kent says: "The general rule is that a trust estate is not to continue beyond the period required by the purposes of the trust; and, notwithstanding the device to the trustees *and their heirs*, they take only a chattel interest, where the trust does not require an estate of higher quality."

No. 40. In Topliff *v.* Topliff, 122 U. S. 131, the court quoted with approval, from Chicago *v.* Sheldon, 9 Wall. 50, 54, as follows:

In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, *the practical interpretation of the parties themselves is entitled to great if not controlling influence.* The interest of each generally leads him to a construction most favorable to himself, and, when the difference has become serious and beyond amicable adjustment, it can be settled only by the arbitrament of law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one.

No. 41. At common law, a trust, in a conveyance of land by one private person to another, could be created by parol, and could also be proven by parol evidence. Under the English statute of frauds, trusts of land could be created by parol, but could only be proven by written evidence. "Trusts, like uses, are, of their own nature, averrable, *i. e.*, may be declared by word of mouth with-

out writing; as if, before the statute of frauds, an estate had been conveyed unto, and to the use of, A and his heirs, a trust might have been raised, by parol, in favor of B. And the statute of frauds will be satisfied if the trust can be manifested, or proved, *by any subsequent acknowledgment by the trustee, as by an express declaration, or any memorandum to that effect*, or by a letter under his hand, or by his answer in chancery, or by his affidavit, or by a recital in a bond, or deed, or by a pamphlet written by the trustee, or by an entry in a bank deposit book; in short *by any writing in which the fiduciary relation of the parties and its terms can be clearly read.*" Lewin on Trusts, 1st Amer. from 8th Eng. Ed. pp. 51, 55, 56; cases cited and notes; Perry on Trusts, vol. 1, sec. 82, and cases cited; 4 Kent Com. 305 and cases cited; 1 Greenl. Ev. sec. 266, and cases cited; Osterman *v.* Baldwin, 6 Wall. 116; Foy *v.* Foy, 2 Hayw. 141.

No. 42. In the case of the Kansas Indians, 5 Wall. 737, 760, the court said:

There is, however, one provision in the Miami treaty,—being in addition to the securities furnished the Shawnees and Weas,—which, of itself, preserves the Miami lands from taxation. This particular provision exempts the lands from "levy, sale, execution and forfeiture." It is argued that these words refer to a levy and sale under judicial proceedings; but such a construction would be an exceedingly narrow one, whereas *enlarged rules of construction are adopted in reference to Indian treaties.* In speaking of these rules, Chief Justice Marshall says: "The language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptible of a more extended meaning than

their plain import, as connected with the tenor of the treaty."

Applying this principle to the case in hand, is it not evident that the words "levy, sale, execution and forfeiture," are susceptible of a meaning which would extend them to the ordinary proceedings for the collection of taxes? Taxes must be first levied; and they cannot be realized, without the power of sale and forfeiture, in case of non-payment. The position, it seems to us, is too plain for argument. The object of the treaty was to hedge the lands around with guards and restrictions, so as to preserve them for the permanent homes of the Indians. In order to accomplish this object, they must be relieved from every species of levy, sale and forfeiture—from a levy and sale for taxes, as well as the ordinary judicial levy and sale.

No. 43. In Choctaw Nation *v.* United States, 119 U. S. 1, 27, 28, 37, 38, the court said:

As was said by this court recently in the case of the United States *v.* Kagama, 118 U. S. 375, 383: "These Indian tribes *are* the wards of the nation; they are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states and receive from them no protection. Because of the local ill-feeling, the people of the states, where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive, and by Congress, and by this court, whenever the question has arisen."

The recognized relation between the parties to this controversy, therefore, is that between *a superior and an inferior*, whereby the latter is placed under the care and control of the former, and which, *while it authorizes the adoption, on the part of the United States, of such a policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing; and that inequality is to be made good by the superior justice which looks only to the substance of the right*, without regard to technical rules, framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws.

The rules to be applied, in the present case, are those which govern public treaties, which, even in case of controversies, between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations. And it is the treaties made between the United States and the Choctaw nation holding such a relation, the assumptions of fact and of right which they pre-suppose, the acts and conduct of the parties under them, which constitute the material for settling the controversies which have arisen under them. The rule of interpretation, already stated as arising out of the nature and relation of the parties, is sanctioned and adopted by the express terms of the treaties themselves. In the 11th article of the treaty of 1855, the government of the United States expresses itself as being desirous that the rights and claims of the Choctaw people, against the United States, "shall receive a just, fair and liberal consideration." * * *

The only money payments secured by the treaty, over and above the necessary expenditures in removing the Indians, in providing for their subsistence for twelve months, after reaching their new homes, and paying for their cattle and their improvements, are, first, an annuity of $20,000 for twenty years, commencing after their removal to the west; and, second, the amount to be expended in the education of forty Choctaw youths, for twenty years, and for the support of three teachers of schools for twenty years, together with the cost of erecting some public buildings, and furnishing blacksmiths, weapons and agricultural implements, in addition to the several annuities and sums secured, under former treaties, to the Choctaw nation and people. It is nowhere expressed in the treaty that these payments are to be made as the price of the lands ceded; and they are all only such expenditures as the government of the United States could well afford to incur, for the mere purpose of executing its policy in reference to the removal of the Indians to their new homes. As a consideration for the value of the lands ceded by the treaty, they must be regarded as a meagre pittance.

It is, perhaps, impossible to interpret the language of this instrument, considered as a contract between parties standing upon an equal footing and dealing at arm's length, as a conveyance of the legal title, by the Choctaw nation to the United States, to hold as trustee for the pecuniary benefit of the Choctaw people; and yet it is quite apparent that the only consideration for the transfer of the lands, that can be considered as inuring to them, is the general advantage which they may be supposed to have derived from the faithful execution of the treaty on the part of the United States; *and when, in that connection, it is considered that the treaty was not executed, on*

the part of the United States, according to its just intent and spirit, with a view to securing to the Choctaw people the very advantages which they had a right to expect would accrue to them, under it, it would seem as though it were a case where they had lost their lands, without receiving the promised equivalent. In such a case there is a plain equity to enforce compensation, by requiring the party in default to account for all the pecuniary benefits it has actually derived from the lands themselves.

It is notorious as a historical fact, as it abundantly appears from the record in this case, that great pressure had to be brought to bear upon the Indians to effect their removal, and the whole treaty was evidently and purposely executed, not so much to secure to the Indians the rights for which they had stipulated, as to effectuate the policy of the United States in regard to their removal. The most noticeable thing, upon a careful consideration of the terms of this treaty, is, that no money consideration is promised or paid for a cession of lands, the beneficial ownership of which is assumed to reside in the Choctaw Nation, and computed to amount to over ten millions of acres. It was not an exchange of lands east of the Mississippi River for lands west of that river. The latter tract had already been secured to them by its cession under the treaty of 1820.

It had accordingly been said in the case of Worcester *v.* Georgia, 6 Pet. 515, 582: The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, *as connected with the tenor of the treaty*, they should be considered as used only in the latter sense. * * How the words of a treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

No. 44. In re Ross, 140 U. S. 453, the court said:

It is a canon of interpretation to so construe a law, or a treaty, as to give effect to the object designed, and for that purpose, all of its provisions must be examined in the light of attendant and surrounding circumstances. To some terms and expressions a literal meaning will be given, and to others a larger and more extended one. The reports of adjudged cases and approved legal treatises are full of illustrations of the application of this rule. The inquiry, in all such cases, is as to what was intended in the law by the legislature, and in the treaty by the contracting parties.

No. 45. In Geoffroy *v.* Riggs, 133 U. S. 258, the supreme court was called upon to interpret the treaty of February 23, 1853, between the United States and France. That treaty contained the following clause:

In all the states of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property, by the same title, and in the same manner as the citizens of the United States.

The question, in the case, was whether citizens of France could inherit real property in the District of Columbia. The court held that, within the meaning of the treaty, the District of Columbia was one of the "states of the union," such construction being necessary to give consistency to the provisions of the treaty, and *not to defeat the consideration given to France, for her concession of certain rights to citizens of the United States.* The court said:

By the last clause of the article, the government of France accords to the citizens of the United States the

same rights, within its territory, in respect to real and personal property and to inheritance, as are enjoyed there by its own citizens. There is no limitation as to the territory of France in which the right of inheritance is conceded. And it declares that this right is given, by the government of the United States, to the citizens of France. To ensure reciprocity, in the terms of the treaty, it would be necessary to hold that by "*states of the union*" is meant all the political communities, exercising legislative powers in the country, embracing, not only those political communities which constitute the United States, but also those communities which constitute the political bodies known as territories, and the District of Columbia. It is a general principle of construction, with respect to treaties, that they shall be liberally construed, so as to carry out the apparent intention of the parties, to secure equality and reciprocity between them.

No. 46. The treaty of October 27, 1795, between the United States and Spain, secured certain privileges to the "subjects of his Catholic Majesty." In the case of the Pizarro, 2 Wheaton, 227, 245, it was contended that the term "subjects" did not include inhabitants of Spain, who were citizens or *subjects of other nations*. The court said:

As to the second objection, it assumes, as its basis, that the term "*subjects*," as used in the treaty, applies only to persons who, by birth, or naturalization, owe a permanent allegiance to the Spanish government. It is, in our opinion, very clear that such is not the true interpretation of the language. The provisions of the treaty are manifestly designed to give reciprocal and co-extensive privileges to both countries; and to effectuate this object, the term "*subjects*," when applied to persons owing allegiance

to Spain, must be construed in the same sense as the term "*citizens*" and "*inhabitants*," when applied to persons owing allegiance to the United States.

No. 47. Vattel says:

Since the sole object of the lawful interpretation of a deed ought to be the discovery of the thoughts of the author or authors of that deed, whenever we meet with any obscurity in it, we are to consider what probably were the ideas of those who drew up the deed, and to interpret it accordingly. This is the general rule for all interpretations. It particularly serves to ascertain the meaning of particular expressions, whose signification is not sufficiently determinate. Pursuant to this rule, we should take those expressions in their utmost latitude, when it seems probable that the persons speaking had in contemplation everything which, in that extensive sense, they are capable of designating; and, on the other hand, we ought to restrict their meaning, if the author appears to have confined his idea to what they comprehended, in their more limited signification. Let us suppose that a husband has bequeathed to his wife *all his money*. It is required to know whether this expression means only his ready money, or whether it extends also to that which is lent out, and is due on notes and other securities. If the wife is poor,—if she was beloved by her husband,—if the amount of the ready money be inconsiderable, and the value of the other property greatly superior to that of the money, both in specie and in paper,—there is every reason to presume that the husband meant to bequeath to her, as well, the money due to him, as that actually contained in his coffers. On the other hand, if the woman be rich,—if the amount of the ready specie be very con-

siderable, and the money due greatly exceeds, in value, all the other property,—the probability is that the husband meant to bequeath to his wife his ready money only.

By the same rule we are to interpret a clause in the utmost latitude that the strict and appropriate meaning of the words will admit, if it appears that the author had in view everything which that strict and appropriate meaning comprehends; but we must interpret it in a more limited sense, when it appears probable that the author of the clause did not mean to extend it to everything which the strict propriety of the terms might be made to include. As, for instance, a father, who has an only son, bequeaths to the daughter of his friend *all his jewels*. He has a sword enriched with diamonds, given him by a sovereign prince. In this case, it is certainly very improbable that the testator had any intention of making over that honorable badge of distinction to a family of aliens. The sword, therefore, with the jewels with which it is ornamented, must be excepted from the legacy, and the meaning of the words restricted to his other jewels. Vattel, Law of Nations, Book 2, c. 17, § 270.

If, however, the technical or other terms relate to things that have different degrees, we ought not scrupulously to adhere to definitions, but rather to take the terms in a sense agreeable to the context; for a regular definition describes a thing in its most perfect state; and yet it is certain that we do not always mean it in that state of its utmost perfection, when we speak of it. Now the interpretation should only tend to the discovery of the will of the contracting parties; to each term we should, therefore, affix that meaning which the party, whose words we interpret, probably had in contemplation. * * Id., § 277.

There is not, perhaps, any language that does not also contain words which signify two or more different things, and phrases which are susceptible of more than one sense. Thence arises ambiguity in discourse. * * The following is the rule that ought to direct the interpretation, in this as well as in the preceding case: We ought always to affix such meanings to the expressions as are most suitable to the subject or matter in question. For, by a true interpretation, we endeavor to discover the thoughts of the person speaking, or of the contracting parties in a treaty. Now it ought to be presumed that he who has employed a word, which is susceptible of many different significations, has taken it in that sense which agrees with his subject. Id., §§ 279, 280.

Every interpretation that leads to an absurdity ought to be rejected; or, in other words, we should not give to any piece a meaning from which any absurd consequences would follow, but must interpret it in such a manner as to avoid absurdity. * * The rule which we have just mentioned is absolutely necessary, and ought to be followed even when the text of the law or treaty does not, considered in itself, present either obscurity or ambiguity in the language. For it must be observed that the uncertainty of the sense we are to give to a law, or a treaty, does not solely proceed from the obscurity, or other defect, in the expression; but also from the limited nature of the human mind, which cannot foresee all cases and circumstances, nor take in, at one view, all the consequences of what is decreed or promised; and finally from the impossibility of entering into that immense detail. Laws and treaties can only be worded in a general manner; and it is the interpreter's province to apply them to particular cases, according to the intention of the legislature or of the contracting powers. Now, we are not, in any case, to

presume that it was their intention to establish an absurdity; and, therefore, when their expressions, taken in their proper and ordinary meaning, would lead to absurd consequences, it becomes necessary to deviate from that meaning just so far as is sufficient to avoid absurdity. Id., § 282.

The reason of the law, or of the treaty,—that is to say, the motive which led to the making of it, and the object in contemplation, at the time,—is the most certain clue to lead us to the discovery of its true meaning. * * The consideration of the reason of a law, or promise, not only serves to explain the obscure or ambiguous expressions, which occur in a piece, but also to extend or restrict its several provisions, independently of the expressions, and in conformity to the intention and views of the legislature, or the contracting parties, rather than to their words. For, according to the remark of Cicero, the language invented to explain the will ought not to hinder its effect. Id., § 289.

No. 48. Grotius says:

The best rule of interpretation is to guess at the will by the most probable signs, which signs are of two sorts, words and conjectures; which are sometimes considered separately, sometimes together. If no conjecture guides us otherwise, the words are to be understood according to their propriety, not the grammatical one, which regards the etymon and original of them, but what is vulgar and most in use; for use is the judge, the law and rule of speech. * * Conjectures are necessary when words and sentences are of several significations, which the rhetoricians call doubtful and ambiguous. * * The principal heads, from which these conjectures arise, are the matter, the effect, and the circumstances or connection.

First. From the matter, as the word *day* (if a truce be made for thirty days) ought not to be understood of natural days, but of artificial ones, as agreeable to the subject-matter. So the word *giving* is taken for a forbearance, according to the nature of the affair it is employed in. So the word *arms* sometimes signifies instruments of war, sometimes armed soldiers, and is to be interpreted either in this or that sense as the matter in hand requires. Secondly. From the effect, where the main thing to be observed is whether the word, taken in its common sense, does produce an effect contrary to reason. For when a word is ambiguous, we must rather take it in that sense which is liable to no absurdity. Lastly. From the circumstances and connection of the words with others, either spoken in the same place, or by the same person. That which proceeds from the same will, though delivered in some other place, or upon some other occasion, has thereby a connection which gives room for reasonable conjectures; for, in a dubious case, the will is presumed to be consonant to itself. Grotius, Book 2, c. 16, §§ 1, 2, 4, 5.

On the other hand, words are to be taken even more strictly than the propriety will bear, if it be necessary in order to avoid an injustice or an absurdity; and without such a necessity, if there be a manifest equity or advantage in the restriction, we are to confine ourselves within the narrowest bounds of their propriety, unless circumstances persuade us otherwise. Id. § 12.

No. 49. Rutherforth says:

Sometimes common usage has given two senses to the same word, one of which is more confined or includes fewer particulars; and this is called its strict sense; the other is more comprehensive, or includes more partic-

ulars; and this is called its large sense. Thus the word, "ware-house," is sometimes used in a large sense, to signify any place where a dealer in any sort of goods, or wares, lays them up, till he wants to bring them out to a place of sale; and it is likewise used in a strict sense, to signify the very place of sale; and then is not otherwise distinguished from a shop than as the former is a close and the latter an open place of sale. When we meet with a word of this sort, in a law, and are doubtful in which of the senses the legislator used it, we must have recourse to some other marks besides his words, to ascertain his meaning. Either of the senses is within the letter of the law, but, because other marks must be used to ascertain the meaning of the legislator besides his words, the interpretation is of the mixed sort.

Rutherforth, Inst., Book 2, c. 7, § 10.

No. 50. Public treaties are to be interpreted like other laws and contracts. Such is the inevitable imperfection and ambiguity of all human language that the mere words alone of any writing, literally expounded, will go a very little way towards explaining its meaning. Wheaton, International Law, Part 3, c. 2, § 17.

When the same provision, or sentence, expresses two meanings, that one which most conduces to carry into effect the end and object of the convention should be adopted. Phillimore, sec. 73.

Treaties of every kind are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction, and course of reasoning, which we apply to the interpretation of private contracts. 1 Kent

Comm. 174; Maryatt *v.* Wilson, 1 Bos. and Pull. 438, 439; Kent International Law, 391.

No. 51. In Cherokee Nation *v.* State of Georgia, 5 Peters, 1, 16, 17, Chief Justice Marshall, delivering the opinion of the court, said:

So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs, and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state, from the settlement of our country. The numerous treaties, made with them by the United States, recognize them as a people capable of maintaining the relations of peace and war, of being responsible, *in their political character*, for any violation of their engagements, or for any aggression committed on the citizens of the United States, by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

A question of much more difficulty remains. Do the Cherokees constitute a foreign state? * * It may well be doubted whether those tribes, which reside within the acknowledged boundaries of the United States, can, with strict accuracy, be denominated foreign nations. They may more correctly, perhaps, be denominated domestic, dependent nations.

No. 52. In Worcester *v.* The State of Georgia, 6 Peters, 515, 559, 560, 561, Chief Justice Marshall, delivering the opinion of the court, said:

The Indian nations had always been considered as distinct independent political communities, retaining their original, natural rights, as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. *They are applied to all in the same sense.* * *

In opposition to this original right, possessed by the undisputed occupants of every country,—to this recognition of that right, which is evidenced by our history in every change, through which we have passed,—is placed the charters granted by the monarch of a distant and distinct region, parcelling out a territory in possession of others, whom he could not remove and did not attempt to remove, and the cession made of his claims by the treaty of peace.

The actual state of things, at the time, and all history since explain these charters; and the king of Great Britain, at the treaty of peace, could cede only what be-

longed to his crown. These newly asserted titles can derive no aid from the articles so often repeated in Indian treaties, extending to them first the protection of Great Britain and afterwards that of the United States. These articles are associated with others recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence, its right of self-government, by associating with a stronger and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority are left in the administration of the state." At the present day more than one state may be considered as holding its rights of self-government under the guaranty and protection of one or more allies.

In the same case, pages 582, 583, Mr. Justice Washington said:

The president and senate, except under the treaty-making power, cannot enter into compacts with the Indians, or with foreign nations. This power has been uniformly exercised, in forming treaties with the Indians. * * * After a lapse of more than forty years since treaties with the Indians have been solemnly ratified by the general government, it is too late to deny their binding force. Have the numerous treaties, which have been formed with them, and the ratifications by the president and senate been nothing more than an idle pageantry?

By numerous treaties with the Indian tribes, we have

acquired accessions of territory, of incalculable value
the union. Except by compact, we have not even claim
a right of way through the Indian lands. We have reco
nized in them the right to make war. No one has ev
supposed that the Indians could commit treason again
the United States. We have punished them for the
violation of treaties; but we have inflicted the punis
ment on them, as a nation, and not on individual offen
ers among them, as traitors.

In the executive, legislative, and judicial branches
our government, we have admitted, by the most solem
sanctions, the existence of the Indians as a separate a
distinct people, and being vested with rights which co
stitute them a state or separate community, not as belon
ing to the confederacy, but as existing within it and,
necessity, bearing to it a peculiar relation.

No. 53. In the case of the United States *v.* Paine, Jud
Parker of the district court of the United States for t
western district of Arkansas, held as follows:

Now we must look to the acts of the government sin
the adoption of this treaty, in order to understand
purpose. We find that in the year 1866 it entered up
the policy of settling tribes of Indians, other than t
five civilized tribes, in the Indian country. Since th
time, by treaties, laws, and executive orders of the pre
dent, it has settled upon reservations in the Indi
country the Cheyennes, the Arapahoes, the Kiowas, t
Comanches, the Wichitas, the Pawnees, the Sacs a
Foxes, the Nez Perces, the Poncas, the Modocs, t
Kansas, the Osages, the Pottawatomies, the Absen
Shawnees, as well as some other small tribes. T
explains why the treaty-making power thought, on Ma
21, 1866, that there was an urgent necessity of the g

ernment for more lands in the Indian Territory. This shows that the government not only had a desire to locate other Indians in the Indian Territory, but to a great extent it has consummated that desire. It is a matter of public history that a number of these tribes, which have been removed to the Indian country, taking advantage of the embarrassment of the government growing out of the war of the rebellion, had gone on the war-parth. The government was desirous of securing peace with them, and of settling them upon reservations, where they could be civilized. It entered into treaties, by which they were to be and were removable to the Indian country. Then again, the white people in other localities were pressing on other tribes and demanding of the government their removal, to get them out of the way of the white settlements, and to locate them where they would be free from intrusion by whites. They were removed to the Indian country. It is true but few of these tribes were settled on the lands in controversy; but I cite the conduct of the government in order to arrive at its policy in regard to the Indian country, and from that policy I receive aid in the construction of the third article of the Seminole treaty. The government wanted to locate other Indians and freedmen thereon. What did the government mean by locating freedmen thereon? Let us again go back to the time when this treaty was made. We find that colored people were held in slavery in all the civilized tribes of the Indian Territory. Slavery was abolished there, as well as elsewhere in the United States, by the emancipation proclamation of the president, and by the thirteenth amendment to the constitution adopted the 13th of December, 1865; and such abolition of slavery was recognized by these tribes in the several treaties made with them in 1866. The government was desirous of

protecting these freedmen, and of securing them homes. It was not known how well the several Indian tribes, who had held them in slavery, would observe their pledges to secure them the rights they enjoyed. It was feared that prejudice, growing out of their former condition as slaves, and of race, would be so strong against them that they would not be protected by the Indians. The government had given them the boon of freedom, and it was in duty bound to secure it in all that the term implied to them. The government feared that to do this it might be necessary to settle them in a colony by themselves. This purpose of the government, should it become necessary, was manifested by the terms of the Choctaw treaty of April 15 (28) 1866. United States *v.* Paine, 2 McCrary, 290.

V.—EXECUTIVE ACTS.

No. 54. A letter of instructions from James Madison, secretary of state, to Robert R. Livingston, minister to France, written within nine months after the cession of Louisiana to the United States, contains the following paragraphs:

DEPARTMENT OF STATE, *January* 31, 1804.

SIR: The two last letters received from you bear date on the — and 30th September; so that we have been now four months without hearing from you. The last from me to you was dated on the 16th day of January, giving you information of the transfer of Louisiana on the 20th of December by the French commissioner, M. Loussat, to Governor Clayborn and Gen. Wilkinson, the commissioners appointed on the part of the United States to receive it. * * * With respect to the western extent of Louisiana, M. Loussat held a language more satisfactory. He con-

sidered the Rio Bravo or Del Norte, as far as the thirtieth degree of north latitude, as its true boundary on that side. The northern boundary, we have reason to believe, was settled between France and Great Britain by commissioners appointed under the treaty of Utrecht, who separated the British and French territories west of the Lake of the Woods by the forty-ninth degree of latitude.

This statement is repeated on page 575, in a subsequent letter from Mr. Madison to Mr. Livingston, dated March 31, 1804. M. Loussat was the commissioner who received the transfer of the Territory of Louisiana from Spain to France in 1800, and transferred it to the United States under the treaty of 1803.

American State Papers, Foreign Affairs, vol. 2, p. 574.

No. 55. James Madison, secretary of state, in his letter of instructions of April 15, 1804, to James Monroe and Charles Pinckney, ministers extraordinary to the court of Spain, says:

No final cession is to be made to Spain of any part of the territory on this side of the Rio Bravo, but in the event of a cession to the United States of the territory east of the Perdido; and, in that event, in case of absolute necessity only, and to an extent that will not deprive the United States of any of the waters running into the Missouri or the Mississippi, or of the other waters emptying into the Gulf of Mexico, between the Mississippi and the river Colorado emptying into the bay of St. Bernard.

American State Papers, Foreign Affairs, vol. 2, p. 630.

The bay of St. Bernard is now known as Matagorda bay.

No. 56. A letter of instructions from James Madison, secretary of state, to James Monroe and Charles Pinckney,

ministers extraordinary to the court of Spain, dated July 8, 1804, contains the following paragraph:

It is to be understood that a perpetual relinquishment of the territory between the Rio Bravo and Colorado is not to be made, nor the sum of —— dollars paid, without the entire cession of the Floridas, nor any money paid in consideration of the acknowledgment by Spain of our title to the territory between the Iberville, and the Perdido.

American State Papers, Foreign Affairs, vol. 2, p. 630.

No. 57. In a letter from James Monroe, minister extraordinary to Spain, to M. Talleyrand, a minister of the French Empire, dated Paris, November 8, 1804, he says:

Your excellency will receive within a paper containing an examination of the boundaries of Louisiana which, it is presumed, proves incontestably the doctrine above advanced, as also that the river Perdido, is the ancient, and, of course, present boundary of that province to the east, and the Rio Bravo to the west.

American State Papers, Foreign Affairs, vol. 2, p. 643.

No. 58. In a letter from the American ministers, Monroe and Pinckney, to the Spanish minister, Cevallos, dated January 28, 1805, they say:

By the cession of Louisiana by his majesty the Emperor of France to the United States it becomes necessary to settle its boundaries with the territories of his Catholic Majesty in that quarter. It is presumed that this subject is capable of such clear and satisfactory illustration as to leave no cause for any difference of opinion between the parties. By the treaty of April 30, 1803, between the United States and France the latter ceded

to the former the said province in full sovereignty, in the same extent and with all the rights which belonged to it under the treaty of October, 1800, by which she had acquired it of Spain. That the nature and extent of the acquisition might be precisely known, the article of the treaty of St. Ildefonso making the cession is inserted in that of Paris. To a fair and just construction, therefore, of that article the United States are referred for the extent of their rights under the treaty of 1803. There is nothing to oppugn its force or detract from the import of its very clear and explicit terms. We have the honor to present to your excellency a paper on this subject which we presume proves in the most satisfactory manner that the boundaries of that province, as established by the treaties referred to, are the river Perdido to the east and the Rio Bravo to the west. The facts and principles which justify this conclusion are so satisfactory to our government as to convince it that the United States have not a better right to the island of New Orleans, under the cession referred to, than they have to the whole district of territory which is above described.

American State Papers, Foreign Affairs, vol. 2, p. 637.

No. 59. A letter from the American ministers, Messrs. Monroe and Pinckney, to the Spanish minister, dated April 20, 1805, contains the following paragraphs:

By the memorial which we had the honor to present to your excellency on the 28th of January last, the epoch of the discovery of the Mississippi and of the waters which empty into it and of the bay of St. Bernard, and of the taking possession of same and of the country dependent thereon, is proved by documents which can not be questioned. By these it is established, in respect to the Mississippi, its waters, and dependent country, as low

down the river as the Arkansas by Messieurs Joliet and Marquette from Canada as early as the year 1673, and to its mouth by the Father Henison in 1680, and by De la Salle and Joutel, who descended the river with sixty men to the ocean and named the country Louisiana, in 1682; and in respect to the bay of St. Bernard in 1685. This was done, at those periods, in the name and under the authority of France, by acts which proclaimed her sovereignty over the whole country to other powers in a manner the most public and solemn, such as making settlements and building forts within it. Of these it is material to notice in the present inquiry two only, which were erected in the bay of St. Bernard, on the western side of the river Colorado, by M. De la Salle, who landed there from France with two hundred and forty persons in 1685. It was on the authority of the discovery thus made and of the possession so taken that Louis XIV granted to Anthony Crozat, by letters patent bearing date in 1712, the exclusive commerce of that country, in which he defines its boundary by declaring that it comprehended all the lands, coasts, and islands which are situated in the Gulf of Mexico between Carolina on the east and Old and New Mexico on the west, with all the streams which empty into the ocean within those limits, and the interior of the country dependent on the same. Such are the facts on which the claim of France rested; such are those on which that of the United States now rests.

The principles which are applicable to the case are such as are dictated by reason and have been adopted in practice, by European powers, in the discoveries and acquisitions which they respectively made in the New World; they are principles intelligible and at the same time founded in strict justice. The first of these is that when any European nation takes possession of any ex-

tensive seacoast, that possession is understood as extending into the interior of the country to the sources of the rivers emptying within that coast, to all their branches and the country they cover, and to give it a right in exclusion of all other nations to the same. * * * The second is that whenever one European nation makes a discovery and takes possession of any portion of that continent, and another afterwards does the same at some distance from it, where the boundary between them is not determined by the principle above mentioned, the middle distance becomes such of course. The justice and propriety of this rule is too obvious to require illustration. A third rule is that whenever any European nation has thus acquired a right to any portion of territory on that continent, that right can never be diminished or affected by any other power, by virtue of purchases made, by grants, or conquests of the natives within the limits thereof. It is believed that this principle has been admitted and acted on invariably since the discovery of America, in respect to their possessions there, by all the European powers. * * *

The above are the principles which we presume are to govern the present case. We will now proceed to apply these principles to the claim of the United States as founded on the facts above stated relative to the discovery and possession of Louisiana by France, and to designate the limit to which we presume they are justly entitled, by virtue thereof, in the quarter referred to. On the authority of the principle first above stated it is evident that, by the discovery and possession of the Mississippi, in its whole length, and the coast adjoining it, the United States are entitled to the whole country dependent on that river, its several branches, and the waters which empty into it within the limits of that coast.

The extent to which this would go it is not in our power to say; but the principle being clear, dependent on plain and simple facts, it would be easy to ascertain it.

It is equally evident by the application of the second principle to the discovery made by M. de la Salle of the bay of St. Bernard, and his establishment there on the western side of the River Colorado, that the United States have a just right to a boundary founded on the middle distance between that point and the then nearest Spanish settlement, which, it is understood, was in the province of Panuco, unless that claim should be precluded on the principle first above mentioned. To what point that would carry us it is equally out of our power to say, nor is it material, as the possession in the bay of St. Bernard, taken in connection with that of the Mississippi, has been always understood as a right to extend to the Rio Bravo, on which we now insist.

In support of this boundary we rely much on the grant of Louis XIV to Anthony Crozat in 1712. That grant, it is true, establishes no new right to the territory. The right had already accrued by the causes, and to the extent contended for, which was never abandoned afterwards, except by the treaty of 1763, which does not affect the present question. This boundary is also supported by the opinions of the best informed persons who have written on the subject with which we have become acquainted. By an extract from a work on Louisiana, written by the Colonel Chevalier de Champigny in 1773, who, being of the country, was doubtless well informed, the Rio Bravo is laid down as the western boundary of that province. This fact is again asserted, with more minuteness, in his second note to that work, in which he states that Louisiana was bounded before the treaty of 1763 to the west by the mountains of New Mexico and

the Rio Bravo. In a book containing several memoirs on different subjects, published about three years since at Paris, is one entitled "A Memoir, Historical and Political, on Louisiana," by the Count de Vergennes, minister of Louis XVI, in which it is stated that Louisiana is bounded to the east by Florida and to the west by Mexico. The opinion of geographers in general confirms that of other writers. By a chart of Louisiana, published in 1762, by Don Thomas Lopez, geographer to his Catholic Majesty, it appears that he considers the Rio Bravo as the boundary of the province, as it does by that of De Lisle of the Royal Academy of Science at Paris, which was revised and republished in 1782. Others might be quoted, but it is useless to multiply them.

American State Papers, Foreign Affairs, vol. 2, pp. 663, 664.

No. 60. A letter from James Monroe, secretary of state, to the Chevalier de Onis, the Spanish minister, dated June 10, 1816, contains the following paragraph:

DEPARTMENT OF STATE, *June* 10, 1816.

SIR: * * * With respect to the western boundary of Louisiana I have to remark that this government has never doubted, since the treaty of 1803, that it exended to the Rio Bravo. Satisfied I am, that if the claims of the two nations were submitted to an impartial tribunal, who, observing the principles applicable to the case, and tracing facts as to discovery and settlement, on either side, that such would be its decision. The discovery of the Mississippi, as low down as the Arkansas, in 1673, and to its mouth, in 1680, and the establishment of settlements on that river, and on the Bay of St. Bernard on the western side of the Colorado, in 1685, under the authority of

France, when the nearest settlement of Spain was in the province of Panuco, are facts which place the claim of the United States on ground not to be shaken.

American State Papers, Foreign Affairs, vol. 4, p. 430.

No. 61. Mr. John Quincy Adams, secretary of state, in his letter of March 12, 1818, to Mr. de Onis, the Spanish minister at Washington, said:

The claim of France always did extend westward to the Rio Bravo, and the only boundaries ever acknowledged by her before the cession to Spain of November 3, 1762, were those marked out in the grant from Louis XIV to Crozat. She always claimed the territory which you call Texas as being within the limits and forming a part of Louisiana, which in that grant is declared to be bounded westward by New Mexico, eastward by Carolina, and extending inward to the Illinois and to the sources of the Mississippi and of its principal branches. Mr. Cevallos says that these claims of France were never admitted nor recognized by Spain. Be it so. Neither were the claims of Spain ever acknowledged or admitted by France. The boundary was disputed and never settled; it still remains to be settled; and here is a simple statement of the grounds alleged by each of the parties in support of their claims:

ON THE PART OF THE UNITED STATES.

(1) The discovery of the Mississippi, from near its source to the ocean, by the French from Canada, in 1683.

(2) The possession taken, and establishment made, by La Salle, at the bay of St. Bernard, west of the rivers Trinity and Colorado, by authority from Louis XIV, in 1685.

(3) The charter of Louis XIV to Crozat, in 1712.

(4) The historical authority of Du Pratz and Champigny, and of the Count de Vergennes.

(5) The geographical authority of De Lisle's map, and especially that of the map of Don Thomas Lopez, geographer to the King of Spain, published in 1762. These documents were all referred to in the letter from Messrs. Pinckney and Monroe to Mr. Cevallos, of 20th April, 1805, since which time, and in further confirmation of the same claims, the Government of the United States are enabled to refer you to the following :

(6) A map published by Homann, at Nuremberg, in 1712.

(7) A geographical work published in 1717, at London, entitled "Atlas Geographicus, or a Complete System of Geography, Ancient and Modern ;" in which the map of Louisiana marks its extent from the Rio Bravo to the Perdido. In both these maps the fort built by La Salle is laid down on the spot now called Matagorda.

(8) An official British map published in 1755 by Bowen, intended to point out the boundaries of the British, Spanish, and French colonies in North America.

(9) The narrative published at Paris, of Hennepin in 1683, of Tonti in 1697, and of Joutel in 1713.

(10) The letter from Col. La Harpe to Don Martin D'Alarconne of 8th July, 1719 (A 1, B 2).

(11) The order from the French governor of Louisiana, De Bienville, to La Harpe of August 10, 1721 (C 3).

(12) The geographical work of Don Antonio de Alcedo, a Spanish geographer of the highest eminence ; this work and the map of Lopez, having been published after the cession of Louisiana to Spain in 1762, afford decisive evidence of what Spain herself considered as the western boundary of Louisiana when she had no interest in contesting it against another State (B 4).

ON THE PART OF SPAIN.

(1) The voyages of Ponce de Leon, Vasquez de Ayllon, Panfilo de Narvaez, Fernando de Soto, Luis Moscoso, and other Spanish travelers in the 16th century, who never made any settlement upon any of the territories in question, but who traveled, as you observe, into countries too tedious to enumerate.

(2) The establishment of the new kingdoms of Leon and Santander in 1595, and the province of Cohaquila in 1600.

(3) The province of Texas founded in 1690.

Here, you will please to observe, begins the conflict with the claims of France to the western boundary of Louisiana transferred by the cession of the province to the United States. The presidios or settlements of Las Texas were, by your own statement, adverse settlements to that of La Salle, who, six years before, had taken formal possession of the country in the name of and by authority of a charter from Louis XIV. They were preceded by an expedition from Mexico the year before; that is, 1689, to hunt out the French remaining of the settlement of La Salle. Now, what right had the viceroy of Mexico to hunt out the French who had formed a settlement under the sanction of their sovereign's authority? You will tell me that from the time when Santa Fe, the capital of New Mexico, was built Spain considered all the territory east and north of that province, as far as the Mississippi and the Missouri, as her property; that the whole circumference of the Gulf of Mexico was hers; and that Philip II had issued a royal order to exterminate every foreigner who should dare to penetrate to it; so that the whole question of right between the United States and Spain with regard to this boundary centers in this: the naked pre-

tension of Spain to the whole circumference of the Gulf of Mexico, with the exterminating order of Philip II on one side; and the actual occupancy of France, by a solemn charter from Louis XIV, on the other. Well might Messrs. Pinckney and Monroe write to Mr. Cevallos, in 1805, that the claim of the United States to the boundary of the Rio Bravo was as clear as their right to the island of New Orleans. * * *

From this work of Joutel it likewise appears that the fort and colony left by La Salle at the westward of the Colorado was destroyed, not as you state by the Indians, but by the Spaniards from Mexico, who, until that time, had never had any settlement of any kind nearer than Panuco, and who, by your own account, had no other right or authority for this act than the royal order of Philip II to exterminate all foreigners penetrating into the Gulf of Mexico.

The settlement of La Salle, therefore, at the head of the bay of St. Bernard, westward of the river, which he called Riviere aux Bœufs, but which you call Colorado of Texas, was not, as you have represented it, the unauthorized incursion of a private adventurer into the territories of Spain, but an establishment having every character that could sanction the formation of any European colony upon this continent, and the viceroy of Mexico had no more right to destroy it by a military force than the present viceroy would have to send an army and destroy the city of New Orleans. It was a part of Louisiana discovered by La Salle under formal and express authority from the King of France; and the royal exterminating order of Philip II was but one of the multitude of sanguinary acts which signalized the reign and name of that monarch, while the name of La Salle is entitled to stand high in the glorious role of the benefactors of

mankind. After this statement, founded upon the m
authentic documents, the foundation of the presidio
Texas, in 1693, was, by your own showing, an unla
ful encroachment upon the territories of France, wh
by the first of the three principles laid down
Messrs. Pinckney and Monroe at Aranjuez, and ab
referred to, extended, on the coast of the Gulf of Mexi
half way to the nearest Spanish settlement of Panu
viz., to the Rio Bravo.

Mr. Adams also cites the following correspondence
tween the French and Spanish officers commanding
the western frontier of Louisiana in the years 1719 a
1721:

A 1.

Don Martin D'Alarconne to M. de la Harpe.

TRINITY RIVER, *May* 20, 1719

MONSIEUR: I am very sensible of the politeness t
M. de Bienville and yourself have had the goodness
show to me. The orders I have received from the Ki
my master, are to maintain a good understanding with
French in Louisiana; my own inclinations lead me equa
to afford them all the services that depend upon
But I am compelled to say that your arrival at the N
sonite village surprises me very much. Your gover
could not be ignorant that the post you occupy belo
to my Government, and that all of the lands west of
Nassonites depend upon New Mexico. I counsel you
give advice of this to M. de Bienville, or you will fo
me to oblige you to abandon lands that the French h
no right to occupy.

I have the honor to be, sir,

D'ALARCONNE

B 2.

M. de la Harpe to Don Martin D'Alarconne.

NASSONITE, *July* 8, 1719.

MONSIEUR: The order from his Catholic Majesty to obtain a good understanding with the French of Louisiana and the kind intentions you have yourself expressed towards them accord but little with your proceedings. Permit me to inform you that M. de Bienville is perfectly informed of the limits of his Government, and is very certain that the post of Nassonite depends not upon the dominions of his Catholic Majesty. He knows also that the province of Las Texas, of which you say you are governor, is a part of Louisiana. M. de la Salle took possession in 1685, in the name of his most Christian Majesty; and since the above epoch possession has been renewed from time to time.

Respecting the post of Nassonite, I cannot comprehend by what right you pretend that it forms a part of New Mexico. I beg leave to represent to you that Don Antoine du Miroir, who discovered New Mexico in 1683, never penetrated east of that province or the Rio Bravo. It was the French who first made alliances with the savage tribes in this region, and it is natural to conclude that a river that flows into the Mississippi and the lands it waters belong to the King, my master.

If you will do me the pleasure to come into this quarter, I will convince you I hold a post I know how to defend.

I have the honor to be, sir,

DE LA HARPE.

C 3.

On the 10th of August, 1721, M. de la Harpe received the following order:

We John Baptiste de Bienville, Chevalier of the Military Order of St. Louis, and commandant-general for the king in the province of Louisiana:

It is hereby decreed that M. de la Harpe, commandant of the bay of St. Bernard, shall embark in the packet of the *Subtile*, commanded by Beranger, with a detachment of 20 soldiers, under M. de la Belile, and shall proceed forwith to the bay of St. Bernard belonging to this province, and take possession in the name of the king; and the west company shall plant the arms of the king in the ground, and build a fort upon whatever spot appears most advantageous for the defense of the place. If the Spaniards or any other nation have taken possession, M. de la Harpe will signify to them that they have no right to the country, it being well known that possession was taken in 1685 by De la Salle in the name of the King of France, etc.

BIENVILLE.

American State Papers, Foreign Affairs, vol. 4, pp. 471, 473, 478, 479.

No. 62. A letter from John Quincy Adams, secretary of state, to Don Luis de Onis, the Spanish minister, contains the following paragraphs:

DEPARTMENT OF STATE,
WASHINGTON, *October* 31, 1818.

SIR: Your letter of the 24th instant, and the proposals contained in it, offered as the basis of a treaty for

the adjustment of all the subjects in discussion between the United States and Spain, have been received and laid before the president of the United States.

I am directed by him to forbear entering into any examination of the historical disquisition, concerning the original pretensions of Spain to all the territories bordering on the Gulf of Mexico and the whole country included in the French colony of Louisiana, which you have thought proper to introduce into your note. The right of the United States to the river Mississippi and all the waters flowing into it, and to all the territories watered by them, remains as entire and unshaken by anything now adduced by you, as by anything which had ever preceded it, in the discussions between the two governments. It is established, beyond the power of further controversy; nor could it answer any useful purpose to reproduce proofs which have already, more than once, been shown, and which, remaining unimpaired, must henceforth be considered by the United States as not susceptible of refutation.

American State Papers, Foreign Affairs, vol. 4, p. 530.

No. 63. On the 12th of August, 1819, ten days before the treaty of February 22, 1819, expired, Mr. Forsyth, our minister to Spain, in a letter to Señor Salmon, the acting secretary of state, served upon the Spanish government the following official notice:

On the 12th day of August His Majesty's government gives notice, by your note of the 10th—of its determination to ratify? no, sir, to send a person to Washington, possessing the confidence of the king, and having the necessary qualifications to terminate this affair. Can it have escaped the observation of this government that this affair must terminate in ten days? While a failure

to resolve finishes the business, in a few days, this government thinks that a definite resolution cannot be taken, without first entering into various explanations with the United States, to some of which the government of the said United States has given occasion. * * The determination to send a messenger to the United States, for explanations, at this period, when his voyage, as it regards the convention, must be useless; and the only hope, which can be entertained from it, is that a new negotiation may be commenced,—a circumstance of especial weight, when it is recollected that this messenger might have been sent to Washington, the desired explanation might have been asked and given, there, prior to the 22d of August, if the king, your master, had decided promptly, on this course. Or is it in the inexplicable and studious avoidance of the natural order of proceeding, in a case of this kind—an application to the minister of the United States near the court of his Majesty, for these necessary explanations, when they might have been possibly long since given, and still may be given before the period arrives, when the convention of the 22d February ceases to be obligatory upon the parties to it? Am. St. Papers, For. Rel., v. 4, pp. 656, 657.

That "period" arrived on the 22d of August, 1819, six months after the treaty was signed.

No. 64. On the 21st of August, 1819, the day before the treaty expired, Mr. Forsyth served on the Spanish government the following notice:

He has the honor to announce that, after the 22d day of the present month, as the ratification of the convention of 22d February will not have been exchanged, all the claims and pretensions of the United States, which, with the spirit of moderation, the love of peace, and the de-

lusive expectation that all causes of difference and dispute with Spain, would be thereby adjusted and settled, they consented to modify or waive, will stand in the same situation as if that convention had never been made; that the United States will hold themselves free to press and enforce them, in any and every mode, consistent with honor, that their interest may require. Am. St. Papers, Id. p. 661.

No. 65. In a communication sent to the Spanish minister, on the 8th of May, 1820, Mr. Forsyth says:

What then must have been the sentiments of the president, upon finding, by your note of the 14th ultimo, that instead of explanations, His Catholic Majesty has instructed you to demand the negotiation of another treaty, and to call upon the United States for stipulations derogatory to their honor and incompatible with their duties, as an independent nation? * * The ratification of that treaty can now no longer be accepted by this government, without the concurrence of a constitutional majority of the senate of the United States, to whom it must be again referred. Am. St. Papers, Id. p. 687.

No. 66. On the 3d of May, 1820, Mr. Adams sent to the Spanish minister a letter, which concluded with the following paragraph:

But it is proper to apprise you that, if this offer be not accepted, the United States, besides being entitled to resume all the rights, claims and pretensions, which they had renounced by the treaty, can no longer consent to relinquish their claims of indemnity and those of their citizens from Spain for all the injuries which they have suffered and are suffering, by the delay of His Catholic

Majesty to ratify the treaty. The amount of claims of citizens of the United States, which existed at the time when the treaty was signed, far exceeded that which the United States consented to accept, as indemnity. The right of territory was and yet is to the Rio del Norte. I am instructed to declare that, if any further delay to the ratification, by His Catholic Majesty, of the treaty, should occur, the United States could not hereafter accept, either of $5,000,000 for the indemnities due to their citizens by Spain, nor of the Sabine for the boundary between the United States and the Spanish territories. Am. St. Papers, id. p. 684.

No. 67. On the 9th of May, 1820, President Monroe sent identical messages to the two houses of congress, in which, after giving notice of the refusal of Spain to ratify the treaty of February 22, 1819, he said:

The result, therefore, is that the treaty is declared to have no obligation whatever; that its ratification is made to depend, not on the considerations, which led to its adoption, but on a new article, unconnected with it, respecting which a new negotiation must be opened of indefinite duration and doubtful issue. * * The attitude of the United States must now be assumed, on full consideration of what is now due to their rights, their interest and honour, without regard to the powers or incidents of the late mission. Am. St. Papers, id. pp. 676, 677.

No. 68. Col. De Mesieres' expedition of 1778

First Report.

With one lieutenant and twenty-two soldiers from Bexar, six militiamen from Natchitoches, and his two sons, he

started from Bexar to Bucarely, where he arrived on the 9th day of March, 1778. * *

He remained, with a few soldiers and five militiamen, whom he kept with the retired lieutenant Tremiño, to go and see the *Tawa-oiases* and Mahas, to assure them of his good will due to that which they entertain for us, and to advise them to establish themselves in *the locality selected for them, which, as they desire, will be either on the Brazos or on the San Xavier river.* *

Second Report.

* *After seven days' march, he reached the Taovaiase village.* The beauty of the country, over which they travelled eighty miles, is beyond expression, being interspersed by many streams that will afford irrigation of the prairies, and the banks of which are covered with forests. The rocky foundation of their beds will render easy the opening of ditches, and finally it abounds in buffalos, herds of deer, and antelopes, turkeys, partridges, geese, cranes, rabbits, and hares, that contribute both to pleasure and to comfort on the road.

From the Brazos river, on which the Tuacanas dwell, *to the stream which waters the Taovaiase village, there is seen, on the right, a forest justly called, by the natives, the "Big Forest."* It is very thick, although not very wide. * The *Taovaiase nation is divided into two villages, one situated north of the "Rio Bermejo"* (Red river), or of Natchitoches, *and the other opposite. The former village* is composed of *thirty-seven houses,* and the *latter* of *one hundred and twenty-three* houses. * *They have fuel at hand, in that big forest* above mentioned, extending eighty leagues in length, and one, two, or more leagues in width, *where bear and wild hogs* are found. * The *Rio Ber-*

mejo runs from the mountains of New Mexico, at about four days' travel from the Taovaiases, and *forms three forks, which unite near the village.* He believes that the occupation of this site (Tao-vaiase village) by a good population, would be of the greatest advantage, in the present and future, it being our key to the north, from which intercourse might be kept up with friendly nations, such as the Comanches and Osages, and full knowledge of more remote ones might be obtained, and any invasion or undertaking, by the English, might be checked.

De Mesieres, having previously sent *notice of his approach to the Taovaiases, the chiefs went out to receive him,* out of the village, dismounted from their horses and raised him on their shoulders. * The day appointed by De Mesieres having come for a general assembly to present to them the gifts sent to them by the commanding general, through the governor of Texas, he assured them of the good will and protection of the two chiefs of the internal provinces and Louisiana. * *They asked De Mesieres to request the commanding general to send Spaniards, who would settle among them,* assuring him that the necessary assistance, for a new settlement, would not be wanting. He gave them his word to do so, *and gave to the two villages the names San Teodoro and San Bernardo, in honor of the two chiefs.* *

Two Englishmen introduced themselves into the vicinity of the Taovaiases, * *asking admission in their villages, to trade and make friendship with them. The Taovaiases did not admit them. On the contrary, having been cautioned by De Mesieres, on his former visit, they violently took from them the goods they were carrying, giving them only the liberty of withdrawing.* * He asked the Taovaiases to surrender the two bronze cannon, which Col. Don Diego Ortiz Parilla abandoned in the fatal cam-

paign, which he undertook against them. * *De Mezieres found among the Tawaiases ten Spaniards of New Mexico, prisoners bought from the Comanches.* Record, United States *v.* Texas, pp. 886, 890, 891, 892, 893, 894.

No. 69. The six printed documents hereto annexed, marked respectively A, B, C, D, E, F, relating to the Expedition of Fragoso, in 1788, are accurate extracts from pages 48, 49, 75, 108, 114, 137, 162, of House Executive Document No. 21, 50th Congress, 1st Session.

A.

Itinerary, diary, and computations of leagues of a journey of discovery from this the province of New Mexico, to the Fort of Natchistochis and the province of the Texas, undertaken by superior orders jointly with Don Pedro Vial, by me, the undersigned, commissioner, for this purpose.—Francisco Xavier Fragoso. Town of Santa Fé, the 24th of June, 1788.

June 24.—This day, all necessary preparations having been made, and after having received the orders of his lordship the governor of this province, Don Fernando de la Concha, and the correspondence and dispatches addressed to their lordship the governor and commandant of said fort and the province of Texas, at about the eleventh hour in the morning, I started from this capital, the town of Santa Fé, with the following persons: Don Pedro Vial, a native of Lyons, France; myself, Francisco Xavier Fragoso, of the city of Mexico; José Maria Romero, Gregorio Leyva, and Juan Lusero, natives of Santa Fé, shaping my course southward, in the direction of the Pecos Village. After leaving the woodland, entered a short cañon and reached a rolling table-land where the village was described. This day traveled 8 leagues.

June 25.—Started at 9 o'clock a. m., southward, leaving a table-land on the right, and heavy timber as far as the ford called the Pecos Ford, and halted at Bernal's. Ten leagues.

June 26.—Started at 6 o'clock a. m.; eastward; good land; reached "Las Gallinas" (The Chickens) at 6 o'clock p. m. It is an habitual camping ground. Eleven leagues.

June 27.—Started at 11 o'clock a. m.; eastward; good land; grass, fuel, and water; halted at 6 o'clock p. m. at a standing spring with cottonwood trees. Eight leagues.

June 29.—Started at 8 o'clock a. m.; same course; good land. There is on the south a low red table-land, and another 1 league distant; then a "Sabinas" (cypress) forest is seen about 2 leagues long. I halted without water at a place which I called San Pedro. Eight leagues.

June 30.—Started at 8 o'clock; same course; leaving a black table-land on the right, and on the left two low red hills and a very extensive waterless valley, which is called Santa Ana. Halted at 6 o'clock p. m. Ten leagues,

July 1.—Started at 7 o'clock a. m.; same course; leaving on the south a white table-land, and on the north some small lakes. Halted at 7 o'clock p. m. at the foot of a black table-land, which I called Santa Rosa. Twelve leagues.

July 2.—Started at 8 o'clock; same course; good land, with the same table-land on the right, and on the left a very extensive plain. After my reckoning, the table-land is about 10 leagues and the plain about 20 leagues long. There is a standing spring and one cottonwood tree. I halted at the spur of the table-land at 7 o'clock p. m. Twelve leagues.

July 3.—Started at 6 o'clock a. m.; eastward course.

Soon entered the plains, which are so extensive that nothing but the sky and plain are seen. Passed this day thirteen lakes. Halted at 7 o'clock p. m. at the head of the Rio Blanco (White River). Twelve leagues.

July 4.—Started at 5 o'clock; same course; keeping along said Rio Blanco, which is a running stream; level land; grass and fuel in abundance. Halted at 6 o'clock. Six leagues.

July 5.—Started at 5 o'clock a. m.; same eastward course down said river; good land. After traveling a short distance, struck the junction of a river which runs from the north and is called "Rio del Tule" (Spanish Dagger River); halted at 6 o'clock p. m. at the forks. Six leagues.

July 6.—Started at 9 o'clock a. m.; same course, still following the said Rio Blanco, on which I halted at 6 o'clock p. m., with fuel, grass, and water. Six leagues.

July 7.—Started at 5 o'clock a. m.; same course along the river, which becomes wider than gunshot distance; camped on its bank at 6 o'clock, at El Castor (The Beaver). Nine leagues.

July 8.—Started at 5 o'clock a. m.; same course, same river, and I camped in a cottonwood grove, where the hills become lower; it was about 7 o'clock p. m. Ten leagues.

July 9.—Started at 6 o'clock a. m.; same course and river, but was compelled to halt at 12 o'clock. Four leagues.

July 10.—Started at 9 o'clock a. m., having found a good watering place, as the river water is brackish; abundance of grass and fuel; same course, still along the river; camped at 3 o'clock p. m. Seven leagues.

July 11.—Started at 5 o'clock a. m.; same course and down the river, the Cumanchis having advised me not to

leave the river, which follows steadily that course; camped at 7 o'clock at San Diego; grass, fuel, and no stones. Twelve leagues.

July 12.—Started before daybreak; same river and course; land level; the river is wider; traveled until 8 o'clock p. m. Thirteen leagues.

July 13.—Started at about 4 o'clock a. m.; same course and river, and we saw on the north of the river the range of hills which, as we were told, was the Juamanes. Here another river running from the north joins the Blanco. It has much water, and is called "Rio de las Plumas" (Feather River); it is less brackish than the Blanco. I camped at about 7 o'clock p. m., on said river, at San Dimas, as I called the place. Twelve leagues.

July 14.—Started at 6 o'clock a. m.; same course and river; another river debouches, which comes from the north; it is wider. Here the rivers and hills become level, and another range of hills, not very high, is seen on the north; again another river, also running from the north, joins the Rio Blanco, and leaving a very extensive plain, I camped at about 6.30 p. m. Ten leagues.

July 15.—Started at 6 o'clock a. m.; same course and along said river; traveled over good land, well supplied with grass, fuel, and meat; halted at 7 o'clock p. m., and crossed the river, which is already very wide. This day I crossed a creek which runs from the south. Ten leagues.

July 16.—Started at 5 o'clock a. m. on a northern course, and on a very large Cumanchi trail, to overtake them and ascertain whether I was or was not on the right direction. I overtook them and camped with them at 6 o'clock p. m. Six leagues.

July 17.—Started at 7 o'clock a. m. to resume an eastern course, being guided by the same Cumanchi who guided Don Pedro Vial to Santa Fé, and he led me over very ex-

tensive plains, good lands, and on a straight line, with grass, fuel, and standing water. I camped at 10 o'clock p. m. at San Antonio. Twelve leagues.

July 18.—Started at 5 o'clock a. m., southward; halted on a river running from the north to join the Rio Blanco, and we understood to be called the San Marcos River. Camped at 6 o'clock p. m. Ten leagues.

July 19.—Started at 5 o'clock a. m.; same course, over plains; good land. The river is very boggy; it is joined by another large river running from the south, called by the Cumanchis "Del Almagre" (Ocher, or Vermilion); at a short distance another river running from the north forms its junction, and I gave it the name of Rio de Dolores (River of Sorrows). After crossing the river a plain intervenes, timbered with oak, and is called "San José." There I camped for the night, at 3 o'clock p. m. Eight leagues.

July 20.—Started at 5 o'clock a. m.; course eastward; after crossing the river struck a plain two or three leagues in length, and reached the Taguayachi (Tahuayase) villages at 9 o'clock a. m. Four leagues.

July 26.—Started at 6 o'clock a. m.; course southward. After crossing said river struck a very fine oak timber, on good level ground; the forest is about 4 leagues wide; next struck a wide and beautiful plain. Camped at the Santa Ana Springs at 5 o'clock. Seven leagues.

July 27.—Started at 6 o'clock a. m., eastward, over level land; several streams close to each other; good fuel and grass. I camped on a small stream at 6 o'clock p. m. The country to this day was alternately prairie and woods. The stream is called San Juan.

July 28.—Started at 6 o'clock a. m., same course, and after traveling 4 leagues we reached a very fine forest which is called "Monte Grande" (Cross Timbers), which

is said to be 200 leagues long and only 3 leagues wide there I camped. Four and one-half leagues.

July 31.—Started at 6 o'clock a. m., eastward course When leaving the forest crossed a small running stream (not very small either) running from north to south; it is said to be "La Trinidad" (the Trinity); thence entered an immense plain and went into camp at 5 o'clock p. m. at a spring which I called El Benado (Deer Spring) Seven leagues.

August 1.—Started at 6 o'clock a. m., same course over said plains, but was soon compelled to halt by rain. Two leagues.

August 3.—Started at 6 o'clock a. m., same course Traveled over heavily-timbered plains, well watered, grass and fuel, but no stones. Halted at 2 o'clock p. m. Crossed to-day two small running streams. Four leagues.

August 4.—Started at 7 o'clock a. m., easterly course over heavily-timbered plains and creeks; found plum and other trees. Three leagues.

August 5.—Started at 6 o'clock a. m., same course, over treeless plains; creeks alone are timbered. No mountain or hill within sight, in any direction. I camped without water, at the outskirts of an oak forest a quarter of a league wide, but how long is not known. I halted at 4 o'clock p. m. Eight leagues.

August 6.—Started at 7 o'clock a. m., same course, over plains and good lands; small creeks. Entered the Natchitoches forest, and halted at 6 o'clock p. m., on a running creek. Eight leagues.

August 7.—Started at 6 o'clock; course southward through the forest, the soil of which is thickly covered with brush, and on so narrow a trail that we sometimes lost it. There are many running streams. Camped at 6 o'clock p. m., on a running creek. Eight leagues.

August 8.—Started at about 9 o'clock; same course and same forest; passed the Ramos Swamp, and camped at 6 o'clock p. m., on a running stream called "De la Piedra de Amolar" (Whetstone Creek), because some excellent such stones are found on the banks of the stream. Four leagues.

August 9.—Started at 7 o'clock; same course and same forest. Found to-day two very large streams, in which we saw alligators. Camped on the Sabine River. Four leagues.

B.

The third article is a very interesting paper, now, we believe, first published in the English language, and which appears to have escaped the diligent and patient researches of Baron von Humboldt and of all subsequent geographers. It forms a valuable contribution to the literature which has been accumulated on this subject. It is an itinerary, diary, etc., of a journey of discovery from the province of New Mexico to Natchitoches by Francisco Xavier Fragoso in 1788.

By platting this itnerary it will be seen that he struck the sources of the main fork, and followed down the Red River for 105 leagues, which brought him to the neighborhood of the Cross Timbers and the Trinity River. Besides these landmarks he also mentions the Sabine River, which he touched before reaching Natchitoches. The accuracy with which the Rio Blanco coincides with the true position of the Red River, including the main or Prairie Dog Town Fork, is quite remarkable when we consider the lack of means at his disposal for determining his position. The location of the Cross Timbers and of the Trinity and Sabine Rivers coincides very nearly with the results of modern surveys.

C.

It distinctly appears in evidence that Red River flows through red clay formation while Prairie Dog Town River flows through a whitish soil worked up by prairie dogs, the one causing red water, the other whitish; Red River the name of one, Prairie Dog Town River the other. Fragoso, in his expedition down Prairie Dog Town River in 1788, named it Rio Blanco, or White River, no doubt for the same reasons that the Indians named this river. And Young, in his testimony, says, in his experience of twenty years residence on Red River, he could always tell by looking at the rise in Red River far below the forks from what stream the rise came by the color of the water.

D.

The one hundredth meridian had been mapped by Lieutenant Pike, as will be seen by his map, as much as two degrees to the eastward of the point near the Great Bend of the Arkansas, where he first reached that river in making a survey of that region in 1806.

According to his map of the province of Texas (made and improved after his passage through Texas, and after extensive intercourse with Malgares, a Spanish officer who had been sent to survey that region of country), there was a fort located high up on the Red River of Natchitoches, immediately north of the head of the Trinity River, noted by him as Fort Yawayhays, corresponding in relative position to the head of the Clear Fork of the Trinity River to the old Spanish fort of Pressler's map of Texas, in Montague County (see sketch of Pressler's map), which was evidently the point where Fragoso tarried for six days in making his survey in 1788 (see Fragoso's Diary, Ev. of

Texas Com., Exhibit A, p. 15), and which he called the "Tagnayase Villages."

E.

It will be noticed from Fragoso's estimate that it was 201 leagues to the Sabine from the head of the Blanco. But he traveled by a direct course, leaving Red River at the Tahuayase Villages (Fort Yawayhays of Pike's map), estimating therefor 32 leagues for the sinuosities of the river, the distance named, 233 leagues, would about reach the Sabine.

It would not seem at all reasonable to suppose that Malgares neglected the important object of intercepting the expedition of Sparks and Freeman, which was coming up Lower Red River, and it is reasonable to suppose, according to the Pawnee hunters' story, that a detachment of three hundred men was sent down the river from the Comanche country for that purpose, while Malgares (perhaps on the same "very extensive plains" south of the Wichita Mountains, over which Fragoso's Comanche guide had led him) (see Exhibit A, page 14) was entertaining the Comanches by the imposing pageant which he described to Lieutenant Pike in the following words: * *

F.

(2) Humboldt delineates but one stream with a few "stations des muletiers" upon it. These stations, however, extend only as far as the country of the Taouaizes, who lived in the vicinity of the cross timbers and far below the junction of the forks. The course of the river is drawn with the view that it is the same as the Pecos and rises near Santa Fé. Humboldt's delineation, copied from Lafond, was erased by Melish to make it correspond

with that of Darby and Bringier, who gave a different direction to its middle course, but maintain the source near Santa Fé.

No. 70. American State Papers, Indian Affairs, vol. 1, page 721, &c.

Historical sketches of the several Indian tribes in Louisiana, south of the Arkansas River, and between the Mississippi and river Grande.

CADDOQUES.—Live about thirty-five miles west of the main branch of Red river, on a bayou, or creek, called by them Sodo, which is navigable, for pirogues only, within about six miles of their village, and that only in the rainy season. They are distant from Natchitoches only about 120 miles, the nearest route by land, and in nearly a northwest direction. They have lived where they now do only five years. The first year they moved there the small pox got amongst them and destroyed nearly one-half of them; it was in the winter season, and they practiced plunging into the creek, on the first appearance of the irruption, and died in a few hours. Two years ago they had the measles, of which several more of them died. They formerly lived on the south bank of the river, by the course of the river, 375 miles higher up, at a beautiful prairie, which has a clear lake of good water in the middle of it, surrounded by a pleasant and fertile country, which had been the residence of their ancestors from time immemorial. * *

The whole number of what they call warriors of the ancient Caddo nation is now reduced to about one hundred, who are looked upon, like Knights of Malta, or some distinguished military order. They are brave, despise danger, or death, and boast that they have never shed

white men's blood. Besides these there are, of old men and strangers who live amongst them, nearly the same number; but there are forty or fifty more women than men. This nation has great influence over the Yatasses, Naudakoes, Nabadaches, Inies or Tachies, Nacogdoches, Keychies, Adaize and Natchitoches, who all speak the Caddo language, look up to them as their fathers, visit and intermarry among them, and join them in all their wars. * *

YATTASSEES.—Live on Bayou river (or Stony creek) which falls into Red river, western division, about fifty miles above Natchitoches. * *

KEYES OR KEYCHIES.—Live on the east bank of Trinity river, a small distance above where the road from Natchitoches to St. Antoine crosses it. There are of them sixty men; have their peculiar native language, but mostly now speak Caddo, intermarry with them, and live together in much harmony, formerly having lived near them, on the headwaters of the Sabine. They plant corn and some other vegetables. * *

INIES OR TACHIES (called indifferently by both names).—From the latter name the province of Tachus or Texas is derived. The Inies live about twenty-five miles west of Natchitoches, on a small river, a branch of the Sabine, called the Natchez; they are, like all their neighbors, diminishing, but have now eighty men. Their ancestors, for a long time, lived where they now do. Their language the same as that of the Caddoes, with whom they are in great amity. These Indians have a good character, live on excellent land, and raise corn to sell. * *

TAWAKENOES, OR THREE CANES.—They are called by both names indifferently, live on the west side of the Braces, but are often, for months, at a time, lower down than their usual place of residence, in the great plain on the

Tortuga or Turtle, called so from its being a hill in the prairie, which, at a distance, appears in the form of a Turtle, upon which there are some remarkable springs of water. Their usual residence is about two hundred miles to the westward of Nacogdoches, towards Santa Fe. They are estimated at two hundred men; are good hunters; have guns, but hunt principally with the bow; are supplied with goods from Nacogdoches, and pay for them in rugs, tongues, tallow and skins.

They speak the same language of the Panis, or Towiaches, and pretend to have descended from the same ancestors. * *

Panis or Towiaches.—The French call them Panis, and the Spaniards Towiaches; the latter is the proper Indian name. They live on the south bank of the Red river, by the course of the river upwards of eight hundred miles above Natchitoches, and by land, by the nearest path, is estimated at about three hundred and forty. They have two towns near together; the lower town, where the chief lives, is called Witchita and the other is called Towaahack. They call their present chief the Great Bear; they are at war with the Spaniards, but friendly to those French and American hunters who have lately been among them; they are likewise at war with the Osages, as is every other nation. For many hundreds of miles around them the country is rich prairie, covered with luxuriant grass, which is green summer and winter, with skirts of wood on the river bank, by the springs and creeks. * * They have but few guns and very little ammunition; what they have they keep for war, and hunt with the bow; their meat is principally buffalo; seldom kill deer, though they are so plenty they come into their villages and about their houses like a domestic animal. Elk, bear, wolves, and wild hogs are plenty within their country, and white

rabbits, or hares, as well as the common rabbit; white bears sometimes come down among them and wolves of all colors. The men go entirely naked, and the women nearly so, only wearing a small flap of a piece of skin. They have a number of Spaniards among them, of a fair complexion, taken from the settlement of Santa Fe, when they were children, who live as they do, and have no knowledge of where they came from. Their language differs from that of any other nation, the Tawakenoes excepted. * *

HEITANS, OR COMANCHES.—* They are strong and athletic, and the elderly men as fat as though they had lived upon English beef and porter. * * They are, for savages, uncommonly cleanly in their persons; the dress of the women is a long, loose robe, that reaches from their chin to the ground, tied round with a fancy sash, or girdle, all made of neatly dressed leather, on which they paint figures of different colors and significations. The dress of the men is close leather pantaloons and hunting shirt, or frock, of the same. * * They alternately occupy the immense space of country, from the Trinity and Braces, crossing the Red river, to the heads of Arkansas and Missouri, to river Grande, and beyond it, about Santa Fe, and over the dividing ridge, on the waters of the western ocean, where, they say, they have seen large pirogues, with masts to them, in describing which they make a drawing of a ship, with all its sails and rigging. * *

The forementioned are all the Indian tribes that I have any knowledge of, or can obtain an account of, in Louisiana, south of the river Arkansas, between the Mississippi and the river Grande. * *

I am, sir, &c., &c.,

JOHN SIBLEY.

NATCHITOCHES, *April* 5, 1805.

General H. DEARBORN.

No. 71. In 1834, fifty-six years after De Messieres visited the Taovaiase village, and 75 years after Parilla's defeat, Col. Henry Dodge, of the United States Dragoons, marched, with his regiment, from Fort Gibson to a village, which he calls the "*Toyash* village."

The Journal of this expedition contains the following statements, quoted on pages 853, 854, of the record in United States *v.* Texas:

"July 15th. Comanches, Kiowas and the band called by us *Pawnee Picts*, but correctly termed the *Toyash*, are friends and to a certain extent allies. The Comanches are, we learn, the largest band, the proudest and boldest; therefore the Colonel has resolved to visit them first; thence to the *Toyash* village.

July 16th. * * The Comanche captains informed us that it is but a short distance to their camp. * * Two or three miles brought us in sight of their camp situated in a valley. * * The Comanches have hoisted an American flag over their camp. * * We are now in sight of a chain of peaks, so-called mountains, bearing south and west. Behind these are the *Toyash* villages. Some of these hills cannot be less than 2,000 feet above the prairie at their base.

July 19th. Marched for the *Toyash* village twenty-three miles southwest. * *

July 20th. The command moved. * * West * * thirty-seven miles; road literally of granite rock for miles. We encamped five miles from the *Toyash* village, which is situated on a branch of the Red River. Width of the branch of Red River about five hundred feet from bank to bank.

July 21st. The command marched for the *Toyash* village; proceeded a mile or two, when we met about sixty Indians, who came out to meet us. * * We soon

reached the village, which is situated *immediately under mountains of granite some six hundred feet in height. In front of the village runs the river.* * *

July 26th. * * From conversation to-day with one of the Indians (Ski-sa-so-ka, an intelligent *Toyash*) we learn that *their nation lived formerly south; that their oldest men were born there.* * * " Record U. S. *v.* Texas, pp. 853, 854.

No. 72. Colonel Dodge, on July 22, 1834, made the following address to the Toyash chiefs and warriors:

We are the first American officers who have ever come to see the Pawnees; we meet you as friends, not as enemies, to make peace with you, to shake hands with you. The great American Captain is at peace with all the white men in the world. We have been sent here to view this country, and to invite you to go to Washington, where the great American chief lives, to make a treaty with you, that you may learn how he wishes to send among you traders, who will bring you guns and blankets and everything that you want. The great American chief wishes also to make peace between you and the Osages; you have been at war with the Osages; and to secure peace between you and the Cherokees, Senecas, Delawares and Choctaws and all other red men, that you may all meet together as friends, and not shed each other's blood, as you have done. On our way to your village we met a party of Comanches. We showed to them a white flag, which said to them, "we wish to be friends." Their principal men were gone to hunt; we treated their old men, women and children with kindness; we gave them presents; they had many horses; we could have taken their horses from them, but did not; we showed to them

that we wanted to be at peace with them; they told us that you were their friends; we were glad to hear it; we have come to your town and found you as defenceless as the Comanches; we have treated you as we treated them; the American people show their kindness by actions, and not by words alone, etc. Doc. 2, 23d Cong., 2d Sess., p. 79.

And on the 23d of July, 1834, he made the following address to the Comanches:

The great American Captain has sent me to view this country, and to offer the hand of friendship to all the red men who are here. He wishes to see you all at peace with each other. He desires you to come and see him that he may fix a permanent peace with your tribes. He will make you presents and he will send traders among you who will serve you with a great many things that you want to make you happy. The President, who is a good father to you, wishes to see you at peace with the Osages, Cherokees, Delawares and all red men. We have endeavored to give you evidence of our friendship. We did so when we passed your camp. You were not at home. Your women and children were defenceless. We treated them kindly. We confided in you, too, etc.

You say that the Indians over Red River are your enemies. They kill you when you meet. These are Mexican Indians and do not make treaties with our great father, the President. But he will protect you when you make peace with the Osages and other tribes that have been at war against you. Id., p. 83.

No. 73. In the same document will be found the report of Major-General Macomb (p. 44), in which, in giving an account of Colonel Dodge's expedition, he says:

Colonel Dodge, accordingly, out of the effective force,

formed six companies, each 42 strong, and under instructions from General Leavenworth continued his march to the Pawnee village, situated on a branch of the Red River. Here Colonel Dodge held a council with the Comanches and Pawnees (or Toyaslas), the Kiowas, and the deputation of Indians which accompanied him, amounting in all to about two thousand persons. He explained the object of the expedition, and was instrumental in bringing about a friendly intercourse between several hostile tribes. He also obtained the surrender of the son of a Mr. Martin, an American citizen who had been murdered by the Indians, and of the black boy captured by them. A more particular account of the interview between Colonel Dodge and the remote tribes will be found in the journal of the expedition annexed to this report.

No. 74. In the same document (pp. 33 and 34) will be found the report of the Secretary of War, in which he uses this language:

It is known to you that some of the western tribes of Indians, roaming through the extensive prairies west of Arkansas and Missouri, particularly the Comanches and Kiowas, have for some years interrupted the peace of that quarter by predatory attacks upon our citizens, and upon the indigenous and emigrant Indians whom we are under obligations to protect. Their war parties have annoyed our citizens in their intercourse with the Mexican States, and have rendered communication difficult and hazardous. It became necessary to put a stop to this state of things either by amicable representations or by force. Those remote tribes have little knowledge of the strength of the United States or of their own relative weakness; and it was hoped that the display of a respect-

able military force for the first time in their country would satisfy them that further hostilities would lead to their destruction. The dragoons being peculiarly adapted to this service were ordered to penetrate into this region and to endeavor, by peaceable remonstrances, to establish permanent tranquillity; and if this should fail, to repel any hostile demonstrations which might be made. Fortunately, the efforts to introduce amicable relations were successful, and the object of the expedition was obtained without a single act of hostility. Colonel Dodge, who led the expedition, and his whole command appeared to have performed their duties in the most satisfactory manner; and they encountered with firmness the privations incident to the harassing service upon which they were ordered.

No. 75. And in the same document (p. 17) the President of the United States in his message uses the following language:

No event has occurred since your last session rendering necessary any movement of the army, with the exception of the expedition of the regiment of dragoons into the territory of the wandering and predatory tribes inhabiting the western frontier and living adjacent to the Mexican boundary. These tribes have been heretofore known to us principally by their attacks upon our own citizens and upon other Indians entitled to the protection of the United States. It becomes necessary for the peace of the frontiers to check these habitual inroads, and I am happy to inform you that the object has been effected without the commission of any act of hostility. Colonel Dodge and the troops under his command have acted with equal firmness and humanity, and an arrange-

ment has been made with those Indians which it is hoped will assure their permanent pacific relations with the United States, and the other tribes of Indians upon that border.

No. 76.

48TH CONGRESS, 1st Session. SENATE. EX. DOC. No. 13.

MESSAGE

FROM THE

PRESIDENT OF THE UNITED STATES

TRANSMITTING

A communication from the Secretary of the Interior of the 4th instant submitting draft of bill "to confirm the title to certain land in the Indian Territory to the Cheyennes and Arapahoes, and the Wichitas and affiliated bands, to provide for the issuance of patents therefor."

DECEMBER 19, 1883.—Read and referred to the Committee on Indian Affairs and ordered to be printed.

To the Senate and House of Representatives:

I transmit herewith a communication from the Secretary of the Interior of the 4th instant, with accompanying papers, submitting a draft of a bill "to confirm the title to certain land in the Indian Territory to the Cheyennes and Arapahoes, and the Wichitas and affiliated bands, to provide for the issuance of patents therefor, and for other purposes."

The subject is presented for the consideration of Congress.

CHESTER A. ARTHUR

EXECUTIVE MANSION,
December 17, 1883.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *December* 4, 1883

SIR: I have the honor to submit herewith for your consideration the draft of a bill prepared by the Commissioner of Indian Affairs entitled "A bill to confirm certain lands in the Indian Territory to the Cheyennes and Arapahoes and the Wichitas and affiliated bands, to provide for the issuance of patents therefor, and for other purposes."

I also submit copy of the report of the Commissioner of Indian Affairs on the subject, together with the inclosures mentioned therein.

The measure has my approval, and I respectfully request that it may be transmitted for the consideration of the Congress.

I have the honor to be, very respectfully, your obedient servant,

H. M. TELLER,
Secretary.

THE PRESIDENT.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *October* 9, 1883.

SIR: In office report dated March 27, 1882, it was recommended that the reservation set apart for the Cheyenne and Arapaho Indians in the Indian Territory, by the Executive order of August 10, 1869, in lieu of the

reservation established by the treaty of October 28, 1867, be confirmed to the said Indians and a draft of a bill for that purpose was submitted.

It having been subsequently represented on behalf of the Wichitas, Caddoes, and affiliated bands, that the proposed reservation included lands which by right belonged to them, embracing even the reservation set apart for these Indians out of a portion of their lands by the so-called unratified agreement of October 19, 1872, which the Government of the United States recognize as their home, I recommended in office report dated May 6, 1882, that Congress be asked to withhold action on the bill until the wishes of the Indians were definitely understood.

The circumstances attending the establishment of the Cheyenne and Arapaho Reservation are set out in office report of March 27, 1882, but for convenience they are here repeated.

By the provisions of the second article of the treaty of October 28, 1867 (15 Stat., 594), the United States set apart for the absolute and undisturbed use and occupation of the Indians parties to said treaty, and for such other friendly Indians as they might be willing, with the consent of the United States, to admit among them, a tract of country west of the ninety-sixth degree, bounded by the Arkansas River on the east, the thirty-seventh parallel of north latitude, being the southern boundary line of the State of Kansas, on the north, and the Cimarron or Red Fork of the Arkansas River on the west and south, in which boundaries are included 4,292,661.15 acres of Cherokee lands west of the Arkansas River.

The Cheyennes and Arapahoes claimed that they did not understand the location of the land set apart by the treaty of 1867; and, as they desired a reservation on the North Fork of the Canadian River, some 60 miles below

Camp Supply, the President of the United States, upon the recommendation of this office, approved by the Secretary of the Interior, by Executive order, dated August 10, 1869, set apart for their use a tract of land lying south of the Cherokee country, as described therein, containing 4,297,711 acres.

The sixth section of the Indian appropriation act of May 29, 1872 (17 Stat., 190), authorized the President of the United States and the Secretary of the Interior—

"To make an appraisement of the Cherokee lands lying west of the ninety-sixth meridian of west longitude, and west of the land of the Osage Indians in the Indian Territory, and south of the southern line of the State of Kansas, ceded to the United States by the Cherokee Indians under their treaty of July 10, 1866, for the settlement of friendly Indians, and report the same to Congress: *Provided*, That the Secretary of the Interior be, and he hereby is, authorized to negotiate with the Southern Cheyennes and Arapahoes for the relinquishment of their claims to the land ceded to them by the second article of the treaty of October 28, 1867, out of the cession made by the Cherokees in the treaty of July 19, 1866; such relinquishment, if obtained, to be in consideration of a sufficient and permanent location for said Cheyennes and Arapahoes upon the lands ceded to the United States by the Creeks and Seminoles in the treaties of March 21 and June 14, 1866, and that the Secretary report the action taken by him under this provision to Congress at its next session."

Agreements were entered into under the provision above quoted, and were submitted to Congress by the Department December 16, 1872, upon which no final action appears to have been taken by that body. (See House Ex. Doc. No. 43, Forty-second Congress, third session; also

Senate Ex. Doc. No. 69, Forty-fifth Congress, second session.) Agreements were also entered into on the 18th of November, 1873.

None of these agreements were ever ratified, and the Cheyennes and Arapahoes still remain on the reservation set apart for them by Executive order of August 10, 1869.

A part of the treaty lands, however, have been conveyed by the Cherokee Nation to the United States in trust for the Pawnees, Poncas, Otoes and Missourias, and Nez Percés, under the provisions of the act of Congress approved March 23, 1883 (22 Stat., 624), and are now occupied by them. These lands also include a portion of those covered by the agreements of November 18, 1873. It would therefore be impossible to locate the Cheyennes and Arapahoes upon their original reservation, without further negotiations, even if it be held that they have not forfeited their right to the same by refusing to locate thereon, and accepting other lands in lieu thereof; nor could the agreements be confirmed unless modified with the consent of the tribes.

The Wichitas, Caddoes, and affiliated bands occupy their present reservation by virtue of an agreement entered into at Washington, October 19, 1872, by the terms of which the United States granted to the said bands of Indians for a home the tract of country bounded as follows, to wit:

"Commencing at a point in the middle of the main channel of the Washita River, where the ninety-eighth meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the line of 98° 40′ west longitude, thence on said line of 98° 40′ due north to the middle of the main channel of the main Canadian River, thence down the middle of said main

Canadian River to where it crosses the ninety-eighth meridian, thence due south to the place of beginning."

In consideration of which, the said Indians ceded and relinquished to the United States all right, title, interest or claim of any nature whatsoever to any lands in Texas, Louisiana, Indian Territory, or elsewhere within the limits of the United States.

This tract of country thus reserved is wholly within the Cheyenne and Arapaho Reservation as established by the Executive order of August 10, 1869.

This agreement was signed in this city by nine chiefs and delegates of the Wichitas and affiliated bands, and although it has never been ratified by Congress, the Indians continue to occupy the reservation.

In a protest against the passage of the proposed bill to confirm to the Cheyennes and Arapahoes the reservation established by the Executive order of August 10, 1869, Niastor, chief of the Wichitas, and Big Man, chief of the Caddoes, with one Joseph Leonard, claiming to be a delegate for these Indians, stated that

"The Wichita, Caddo, and affiliated bands have never authorized their chiefs and delegates to enter into any agreement or treaty with the Government disposing of the lands belonging to said Indians, or to receive any consideration therefor, but said Indians have condemned and repudiated the so-called agreement of October 19, 1872, when they obtained knowledge of its existence, as unauthorized, and as deceptive and fraudulent in character, for the consideration mentioned therein the said Indians already possessed in their own right."

They denied that the Cheyennes and Arapahoes refused to locate upon or accept the lands given them by the treaty of October 28, 1867, and claimed that they want the land assigned them by the treaty, with the addition of that lying

between the Canadian and Cimarron Rivers, and that the Cheyennes and Arapahoes admit that the lands south of the Canadian belong to the Wichitas.

In a communication dated July 12, 1882, Joseph Leonard asked as a reserve for the Wichitas and affiliated bands all that part of the Indian Territory west of the ninety-eighth degree of west longitude, and south of the Canadian River, except the Kiowa and Comanche Reservation.

In view of these conflicting claims and the fact that the occupants of neither of these reservations had any permanent title, Special Agent Townsend was instructed, under date of January 20, 1883, to visit the two reservations for the purpose of ascertaining the wishes of the several tribes, their needs and requirements, so that an intelligent recommendation might be made to Congress, for the purpose of securing the necessary legislation to confirm to them reservation which would be sufficient for their wants and located as near as might be in accordance with their wishes.

Various communications have been received both before and since the date of Special Agent Townsend's instructions from General Albert Pike, Luther H. Pike, General W. B. Hazen, and others in support of the claims of the Wichitas to the country south of the Canadian.

Luther H. Pike, as counsel for Joseph Leonard, alleged delegate, submitted a printed brief of thirty-one pages, in which the history and claims of this tribe are fully set forth.

(It may be remarked that Joseph Leonard has failed to furnish any evidence that he is authorized to represent these Indians, although repeatedly requested to do so.)

In this brief Mr. Pike claims that the Wichitas, prior to 1867, and from time whereof the memory of man runneth not to the contrary, were in actual occupation of the country round about the Wichita Mountains, their oc-

cupation and use thereof extending north and south from Red River to the Canadian, and east and west from the ninety-eighth to the one hundredth degree of west longitude.

The title of the United States to this tract of country was originally acquired from the Quapaws by treaty of August 24, 1818. (7 Stat., 176.) It was ceded to the Choctaws by the treaty of October 18, 1820 (7 Stat., 277); made the common property of the Choctaws and Chickasaws by the treaty of June 22, 1855 (11 Stat., 611), by whom it was leased to the United States under the same treaty; and was ceded to the United States by the treaty of April 28, 1866. (14 Stat., 769.) This cession, Mr. Pike claims, was void, for the reason that the Quapaws, a branch or band of the Osage Nation, were not at the time, nor ever had been, occupants of the country, and that all subsequent transfers and repurchases, being based upon this cession, were null and void.

He also claims that at a council held at Fort Arbuckle July 1, 1859, the Wichitas, Caddoes, and the Texas Reserve Indians were promised this country by Superintendents Rector and Neighbors. He says Superintendent Rector—

"Described to each band the particular country selected for it. He informed them of the determination of the United States to establish a military post near their selected reservations, and with personal promise that he would use every effort in his power to see justice done them, he, in the name, and on behalf of the United States, guaranteed them protection from all harm by the United States; and that none would be permitted to intrude upon them, and that they and their children would be permitted to remain on the particular reservations selected for them, and have all the other country as a common hunting-ground and a range for their cattle as long as the waters should run."

He asks on behalf of these Indians that—

"The United States forthwith rescind and amend the Executive order of August 10, 1869, in so far as it embraces the country south of the main Canadian, that conferring with them, proper steps be taken by the United States to establish and make known in conformity with their agreement of July 1, 1859, the boundaries of their country by means of a patent or grant under the third section of the act of May 28, 1830 (4 Stat., 412), to the end that the lawless and rapacious may be deterred from troubling them, and they having their country secured to them by unquestionable title, may live there undisturbed and continue to walk in peaceful ways and be friends of the whites."

That these things being done, the United States shall in all other respects carry out the promises given at Fort Arbuckle; that there be not made for them some small reservation, thereby making improvements and development an impossibility; and that they be permitted to establish their right to the portion of their country claimed by the State of Texas; also their claims for the losses they have been made to suffer, and for compensation for that portion of their country allotted to the Comanches, Kiowas, and Apaches, and that what is justly due them on these accounts and under treaty stipulations be promptly paid to them.

In a communication dated April 14, 1883, received by Department reference, General W. B. Hazen calls attention to the subject of these Indians, and states that he feels specially interested in the question, having been their superintendent, and having without any intention aided in bringing about what he now desires to see corrected. He recites the action which led to the Executive order of August 10, 1869, which took away from the

Wichitas and affiliated bands all of the lands claimed by them not previously assigned to other tribes, and states that neither Superintendent Hoag nor himself could knowingly have recommended that the southern boundary of the Cheyenne and Arapahoe Reservation should have come south of the main Canadian. He most earnestly recommends that there be set aside, for a permanent reservation and home for these Indians, a tract of country between the Canadian, the Red River, and the Kiowa and Comanche Reservation, and between the 98th and 100th degrees of west longitude, and states that it would restore to them the reservation given them by Superintendent Neighbors in treaty, and confirmed by the Government in 1859.

From these statements and arguments it appears that the Wichitas found their claim to the country south of the Canadian, first, upon occupancy from "a time whereof the memory of man runneth not to the contrary," and, second, upon the promises made by Superintendents Rector and Neighbors at Fort Arbuckle on the 1st of July, 1859.

As to the first point, I quote from Special Agent Townsend's report, submitted July 26, 1883, as follows:

"Niastor, the present chief, related to me in open council the story of their migration as he had been taught it by his mother. Utstutskins, one of the oldest and best men in his tribe (now dead), related the same story to his agent in open council last January. The Wichitas are often referred to as Pawnee Picques, and they are proud of the evidence and proof of it in the tatooed marks upon their persons.

"It is a well known fact that the Pawnees were once a large and powerful and warlike people. It is also a well-known fact that they were driven by internecine wars from the upper waters of the Missouri, and migrated southward.

This part of their history dates back two hundred years, and is contemporaneous with the early history of the Wichitas."

He states that the Wichitas are an offshoot from the Pawnees, which gives a clew to their early history, which is substantially the same as that given by Utstutskins and Niastor, and is to this effect:

"That originally they were living upon the Missouri River; that warlike and hostile tribes came down the river and, greatly outnumbering them, drove them south and west from the Missouri River into the country at present occupied by the Osage Agency. They remained there and planted fields for a number of years, until at last that country became crowded, and the Wichitas sent out an exploring party west and south to look up a new location and home for them. This party returned and reported having found a beautiful country, when all the Wichitas pulled up stakes and started. They walked, as this was before they had seen any horses. They stopped at a big bend in the river, among sand hills, on the North Fork of the Canadian.

"They remained here about ——— years, when a party started off and located at the mouth of Otter Creek. They were also over in Texas—then Mexico. Most of their oldest men now living remember being on the Brazos River and at the mouth of the Little Wichita, many of them being born at the latter place. They were broken up in scattered bands, and when the old chief with the band on the Brazos died his band joined the band at the mouth of the Little Wichita, on the south side of the Red River in Texas.

"After remaining here for some years they crossed Red River again and went forth and located at Rush Spring, or on Rush Creek, in what is now the Indian Territory,

and joined other bands of their people who during these years had remained in and about that part of the country (*i. e.*, in and through and about the Wichita Mountains), never staying more than a few years in one location, which fact was due partly to their migratory habits and disposition and partly to the depredations of their hostile neighbors. Instead of the Wacos and Towaconies being separate Indians, or Texas or Plains Indians, as they are generally recognized and spoken of, they are Wichita Indians, offshoots from the parent stock which migrated south from where the present Osage Reservation is. * * *"

He concludes that they have no more foundation in fact for the claim to original occupancy of the tract claimed by them than they have to certain tracts or districts in Kansas, New Mexico, or Texas through which they may have roamed and where they may have sojourned temporarily.

This conclusion appears to be correct. The nature of the occupancy of the country by these Indians is not such as to impeach the title derived from the Quapaws, which has been recognized by subsequent treaties with the Choctaws and others.

It is true, as claimed, that the character and geographical situation of this country were but little understood at the time of the Quapaw cession, and it is possible that the title of the latter Indians was not much higher than that of the Wichitas. It has been recognized by the Government, however, and the evidence in favor of the Wichitas is not strong enough to invalidate it even if their claim had never been released.

In the second place the Wichitas based their claim to the country south of the Canadian upon the promises made by Major Neighbors and Superintendent Rector at Fort Arbuckle.

At a general council of the Wichita and other affiliated tribes convened at the Wichita Agency January 22, 1883, as certified to by William Shirley, interpreter, it was claimed by the various chiefs of the different bands that at the council at Arbuckle the Indians were promised the country extending from Red River to the Canadian and from the Chickasaw country (or the ninety-eighth degree of west longitude) to the Antelope Hills (near the one hundredth degree), and this is the claim made on their behalf by Mr. Pike and others. Reference to the contemporary correspondence concerning the council at Fort Arbuckle does not bear out this construction.

In a letter dated February 1, 1855, Superintendent Neighbors suggested the propriety of negotiating with the Choctaw delegation, then in Washington, for a tract of land lying on the east side of Red River (known as Cache Creek) near the Wichita Mountains, for the colonization of the Wichita Indians and such other Prairie Indians as might be convenient to that location. (This recommendation is a recognition of the fact that the Choctaws and not the Wichitas had the title to the country in question.) It is presumed that this suggestion ultimately led to the council at Arbuckle.

Troubles having arisen between the various tribes located in Texas and the frontiersmen of that State, it was determined to colonize these tribes in the Indian Territory, upon the lands leased from the Choctaws (the country now claimed by the Wichitas); Superintendent Neighbors was charged with this duty.

On the 30th of March, 1859, Superintendent Rector was informed that the want of a military post with an adequate force at the proper point had necessarily delayed the commencement of operations for colonizing the Indians in the leased country, including the Wichitas,

but that the War Department had determined to establish the post. He was therefore instructed to select a proper site for the agency in the same vicinity, and at the same time to fix upon a suitable location for the Wichitas and make such an examination of the country as would enable him to determine upon the proper place for locating and colonizing the Texas and other Indians, which it was intended to place within the leased district. In carrying out this policy the different bands were to be located upon distinct reservations, to be divided in severalty.

On the 2d of July, 1859, Superintendent Rector submitted his report in which he gives an account of his travels in search of suitable locations, describes those selected for the Delawares and Caddoes, Wichitas and others, and states that on the 30th of June he met Major Neighbors, who had arrived with the headmen of the Comanches, Huecos, Tanques, Tawacarros, Caddoes and Anadaghcos; that after Mr. Neighbors and himself had fully conferred together, the headmen of all the bands of those there, and of those in Texas, met in council, and were informed by them of the selections which had been made for their future homes; that they explained to the Indians the great pain and regret felt by the Government at being compelled so hastily to remove those in Texas to another country, but assured them that they would be paid for all losses thus incurred, and that after removal they would occupy a country belonging to the United States and not within any State, where none could intrude upon them, and they would remain, they and their children, as long as waters should run, protected from all harm by the United States; that to the Wichitas they also promised to endeavor to obtain remuneration for their losses, incurred in consequence of the hostility of the Comanches, provoked by the slaying of their people

encamped with peaceful intentions by the troops of the United States; and that the Indians expressed themselves entirely satisfied with the country selected for them.

It will be observed that the country selected was spoken of by these superintendents, who were well acquainted with both it and the Indians, as belonging to the United States and not to the Wichitas, they being present and expressing themselves as satisfied with the selection. They reported that the Indians were not prepared to take lands in severalty, and that such action would result disastrously. He states that the country around the Wichita Mountains should be reserved as common hunting ground.

On the 14th of July, 1859, Superintendent Neighbors submitted his report concurring in that of Mr. Rector. On the 18th of July, 1859, Superintendent Rector transmitted a sketch of the country then recently visited by him, showing the selections made for the Wichitas and Kichais, Delawares and Caddoes, and the several bands to be removed from Texas, which he says is a very accurate one.

This sketch shows the reservation selected for the Wichitas and Kichais to be immediately south of 35° 30′, north latitude and immediately west of the ninety-eighth degree of west longitude, being 13½ miles in length and 8 in width, and containing by calculation 69,120 acres.

The reservation selected for the Caddoes, Delawares, and Texas Indians is a few miles southwest of the Wichita selection, being 19 miles long and 7 miles wide, containing 85,120 acres; total, 154,240 acres. Both these reservations are within the reservation at present occupied by the Wichitas.

S. A. Blain, agent for the Wichitas, in a report dated January 15, 1859, advocates bringing the Shawnees and

Kickapoos to that agency, and states that he had invited the chiefs of the Kickapoos to bring their people to his camp and settle upon the same terms granted to the Wichitas and others. He also says that—

"The extent of the country, its fertility, its capability of sustaining a dense population, contradicts the position assumed that it was intended alone for the Wichitas, Keechies, and a few other trifling bands, all of whom collected and settled as contemplated will not make up a population of more than 4,000."

From these reports there does not appear to be any foundation for the claim that the agreement at Arbuckle gave the country south of the Canadian to the Wichitas. On the contrary, their reservation was exactly defined, it being suggested that the country around the Wichita Mountains be reserved as "common hunting ground."

Mr. Pike says that Superintendent Rector promised the Indians "that they and their children would be permitted to remain on the particular reservations selected for them, and have all the other country as a common hunting ground and range for their cattle as long as the waters should run." This statement is true as to the particular reservations only. Superintendent Rector does not state that he promised the country (except the reservations) to the Indians for any purpose, but says the country around the Wichita Mountains "ought to be reserved as common hunting grounds, for which alone nearly the whole of it is fitted." Not a word is said of a range for cattle.

In the absence of any agreement ceding their lands, therefore, it is believed that the claims of the Wichitas cannot be sustained, but unless the agreement entered into October 19, 1872, can be successfully impeached, they have parted with whatever rights they may have possessed prior to that time.

It will be observed that Mr. Pike in his printed brief is silent upon this point. Mr. Leonard, however, as before stated, claims that said agreement was unauthorized, deceptive, and fraudulent in character.

At the council before referred to, purporting to have been held January 22, 1883, the several chiefs stated that their people had never consented to give any part of their country away. To the proceedings of the council is appended the affidavit of Philip McCusker, interpreter, to the effect that he was in Washington with the delegation from the Wichitas and affiliated bands in 1872; that Commissioner Walker told them that he wanted to fix the western boundary of the reservation: that he had decided to establish it 10 miles west of Fort Cobb, but none of the Indians were willing to consent to this, as they claimed to the 100th meridian, or, as they stated it, about 6 miles west of Antelope Hills; that the Commissioner refused to take any further action; and that the Indians, without consenting to the line fixed by the Commissioner, returned to their homes.

J. J. Sturm, in an affidavit taken at the same time, deposes that he accompanied the delegation to Washington; that the Commissioner told them that he had brought them to Washington to tell them where the boundaries of their reservation would be fixed, and first spoke of making Cobb Creek the western boundary, to which all of the Indians wanted to protest, but the Commissioner would not permit them to talk; that the Commissioner finally said that he would fix the boundary so as to take in the headwaters and tributaries of Cobb Creek, which was substantially the same as had been determined on by the Commissioner, and to which the Indians were unwilling to consent, although they finally signed a paper to that effect under protest, which has never been ratified by the

tribes; and that when they returned home they were abused by their people because they had signed such a paper.

William Shirley, interpreter, also testified to the same effect, stating that the delegation alleged that they had not been delegated by their people to cede any part of their country, or to relinquish any rights they might possess. These interpreters also testify that as the agreement has never been ratified either by the tribes or by Congress the Indians regarded it as void.

Special Agent Townsend reports that the Indians repudiate and reject the unratified agreement, and claim that they were coerced into signing it; that all but three of the signers are dead; that from two of them he could gain but little satisfaction, but that George Washington, a very reliable and intelligent man, and one of the signers, told him that at the time of the signing of that agreement the Indians did fully understand the conditions and terms of the papers they were signing; that at first Commissioner Walker proposed to run the western boundary near old Fort Cobb, but upon the Indians objecting, the lines were carried beyond the timber farther west, and then they, the Indians, were satisfied; that this is corroborated by the statements of others; and from the fact that by this agreement they obtained 589,517.19 acres more than was originally assigned them by the promises made at Fort Arbuckle, it is fair to presume that they were satisfied.

That this agreement was signed by all of the delegates from the different bands present in Washington, nine in number, does not admit of question. As to their authority to make such an agreement, the report made October 10, 1872, by Special Commissioner Henry E. Alvord, under whose charge they were brought to Washington, furnishes important information. He says:

"The Caddoes, Wichitas, and affiliated bands have yet no country which they can call their own; and it is very important that they should be satisfied in this respect. Most of the Indians of their agency are on the north side of the Washita River and south of the Canadian, but some are in the Eureka Valley and below, on the Comanche Reservation. To allow their occupation of any part of a reservation already set apart formally for other tribes will cause confusion and difficulties. There is a fine country between the Canadian and Washita Rivers never yet specially assigned, and abundant for these people. Every tribe and band of them are represented by chiefs or headmen in the delegation, prepared to discuss and settle their reservation question at the present visit, and I trust the matter will be fixed before they return to their people. After a careful consideration of this subject, extending through the past five years, and thorough discussion of it with the Indians interested, I recommend that the country between the main channels of the Canadian and Washita Rivers, from west longitude 98 to 98.30, be set apart for a permanent reservation for the Caddoes, Wichitas, and affiliated bands." (Annual Report, 1872, p. 140.)

This is the tract of country included in the agreement, except that the latter extends some ten miles farther west. Of the Caddoes he says: "The most important matter for this tribe is the final adjustment of their reservation question" (page 139). Of the Wichitas and their affiliated bands he says: "These tribes are interested, like the Caddoes, in the settlement of their reservation question are prepared by their delegates to fix the matter during this visit."

The Commissioner of Indian Affairs, Hon. Francis A Walker, in his annual report for 1872, referring to the Wichita Agency, says:

"A permanent reservation should be set aside for this agency. * * * In the chapter of this report containing specific recommendations for legislation to be had by Congress at its approaching session will be found the text of an agreement between these bands and the Commissioner of Indian Affairs, by which the Indians relinquished all their claims on account of lands formerly held by them, and of which they were dispossessed without their consent, and the Government on its part confirms to them the tract now in fact occupied by them. Effect should be given to this agreement by Congress at as early date as practicable. The claims relinquished have been long before Congress, and may or may not have merit, a question not here considered; but it is equally for the interest of the Government and of the Indians that these bands should be put as early as practicable in the way of self-support, a result which will be greatly forwarded by confirming to them a permanent home." (Page 44.)

These extracts show that this delegation had authority to make the agreement. They also show that the consideration for the relinquishment of their claims to land was the fact that by such relinquishment they secured undisputed title to a large tract of country, their right to which had theretofore been questioned.

There is no question in my mind but that the Wichitas and affiliated bands, by the agreement of October 19, 1872, relinquished all claims which they might have had before that date to any and all lands within the United States, except the reservation now occupied by them; and had the agreement been confirmed by Congress at the time, as it should have been, its validity would never have been disputed or questioned.

It is also claimed on behalf of the Wichitas that they were promised remuneration for their losses incurred in

consequence of the hostility of the Comanches, provoked by the slaying of so many of their people by the troops of the United States, and the consumption of their fields of corn by those troops, and on behalf of the Texas Indians that they were assured that they would be paid for all losses incurred by reason of their hasty removal.

As to the claim of the latter Indians, Superintendent Neighbors reported, under date of September 3, 1859, that on the 1st of that month he turned over to Superintendent Rector all the Indians and Government property, after returning to the Indians all their property of every name and nature.

Superintendent Rector submitted an estimate of funds required for the Wichitas and affiliated bands and for the "Texan Indians" for the fiscal year ending June 30, 1861, aggregating $137,667.50, including an item of $10,000 for building houses in lieu of those abandoned in Texas.

An aggregate appropriation was made of $121,260 for these Indians, one of the purposes named being "for building houses in lieu of those abandoned in Texas" (12 Stat., 56), and this phrase is repeated in the appropriation bills for the succeeding years up to and including the year 1864, the amount appropriated for the Texas Indians being $22,825, and for the Wichitas $37,800, annually. The same amount was also appropriated for the year ending June 30, 1865, and smaller amounts for succeeding years. For the year ending June 30, 1871, $40,000 was appropriated to promote the civilization, comfort, and improvement of the Wichitas and other affiliated bands and Indians in country leased from the Choctaws; and appropriations varying in amount from $15,000 to $50,000 have been annually made since that year for the same purpose.

These Indians are not entitled to annuities by any treaty

stipulations, and it is believed that the liberal appropriations made by Congress for their benefit during the last twenty-three years have amply discharged any and all obligations, moral or legal, resting upon the Government on account of promises made by its agents at Fort Arbuckle or elsewhere.

I have gone into this question at considerable length because of the extravagant claims made in behalf of the Wichitas, and because of the various and respectable sources from which appeals in their favor have been received, but from a thorough examination of the papers submitted and the records and correspondence on file, I am convinced that the only obligation now resting upon the Government is that of confirming to these Indians by a secure and permanent title the lands now occupied by them. To this end the agreement of October 19, 1872, should be ratified by Congress and the title confirmed by patent.

Special Agent Townsend, in concluding his report as to the Wichitas, says their claims—

"Are of long standing, and their rights should be defined and guaranteed to them by some authority from which there shall be no appeal. Emigration and civilization are pressing upon these people on all sides, and the imperative necessity for prompt action in the premises must be apparent without further argument."

With this conclusion I fully agree; I also believe that security of title is one of the surest safeguards for the Indians, and that such security is absolutely necessary for their improvement and self-support. It is also necessary for the purpose of avoiding troublesome questions in the future. Similar action should be taken regarding a reservation for the Cheyennes and Arapahoes.

It is claimed on behalf of the Wichitas that the Execu-

tive order of August 10, 1869, was only intended as a temporary measure to provide for these Indians until Congress could insure a permanent reservation, and such was undoubtedly the case. It is also claimed that the act of May 29, 1872, limited the Department in the selection of a reservation to the lands ceded by the Creeks and Seminoles, and such construction appears to be warranted by the terms of the act. Negotiations were had, however, and an agreement reported to Congress by which the Cheyennes and Arapahoes relinquished their treaty reservation and accepted one within the Creek and Seminole country, but Congress refused or neglected to ratify the agreement. It is therefore thought that the authority conferred by the act of May 29, 1872, is exhausted, and that the Department is at liberty to make such arrangements, subject to the approval of Congress, as it may deem expedient.

The Wichitas also claim that the Cheyennes and Arapahoes do not desire any portion of the country south of the Canadian, in support of which assertion they forwarded a paper purporting to be signed by eight chiefs of the Cheyennes and Arapahoes. Regarding this paper, Special Agent Townsend reports that the Cheyennes and Arapahoes, in joint council with the Wichitas, in the presence of himself and Agents John D. Miles and P. B. Hunt, repudiated it as false and fraudulent from beginning to end, conceived in malice and obtained through intrigue and deceit.

He further says:

"The Cheyennes and Arapahoes have repeatedly been assured by the authorities in Washington that they should remain upon and be protected in the possession of their present reserve. By recent leases effected with white men for a portion of their country for a period of ten

years, with the knowledge of the Department, they are strengthened and fortified in their possessions and the rights guaranteed them through said Executive order. They appreciate fully the revenues to be derived from these leases, and will under no circumstances relinquish these advantages unless compelled to do so by force. In my judgment any attempt to dispossess them will result in bloodshed and probably lead to a desperate Indian war. The amount of land per capita at present held by the Cheyennes is 583 acres, that of the Wichitas 576 acres, a comparatively small and insignificant difference, while the actual wants and needs of each tribe are about the same."

The area of the present reservation is about the same as that of the one secured by the treaty.

In view of the length of time the Cheyennes and Arapahoes have been permitted to occupy this reservation, and the failure of Congress to act upon the agreements made, I believe that the best and wisest plan is now for the Government to confirm their title to the same, less the Wichita reservation, and to declare the treaty reservation restored to the status it held prior to said treaty.

It is proper to add that the title to that portion of the Cheyenne and Arapahoe Reservation as established by the Executive order of August 10, 1869, not included in the tract claimed by the Wichitas, was acquired from the Creeks and Seminoles by the treaties of June 14, 1866 (14 Stat., 785), and March 21, 1866 (14 Stat., 755), respectively.

In accordance with these views, I have prepared drafts of a bill providing for the issuance of patents to the Wichitas and affiliated bands, and to the Cheyennes and Arapahoes, for the reservations occupied by them, respectively, with the condition that the lands shall revert to the United States if the Indians become extinct or abandon the same.

The western and southern boundaries of the Cheyenne and Arapahoe Reservation are incorrectly described in the Executive order of August 10, 1869, as follows:

"Thence south on the line of said one hundredth degree to the northern boundary of the country set apart for the Kiowas and Comanches by the second article of the treaty concluded October 21, 1867, with said tribes; thence east along said boundary," &c.

The treaty of October 21, 1867, fixes the north boundary of the Kiowa and Comanche Reservation as follows:

"Thence due west to the North Fork of Red River, provided said line strikes said river east of the one hundredth meridian of west longitude; if not, then only to said meridian line," &c.

By actual survey the north line of this reservation was found to strike the North Fork of the Red River some 30 miles east of the one hundredth meridian. Hence a continuation of the west boundary of the Cheyenne and Arapahoe Reservation along the one hundredth meridian would not strike the north boundary of the Kiowa and Comanche Reservation.

I have therefore corrected this inaccuracy by extending the west boundary south on the line of the one hundredth degree of west longitude to the point where it strikes the North Fork of the Red River, thence down said North Fork to the point where it strikes the northwest corner of the Kiowa and Comanche Reservation, thence along the north boundary of said reservation, &c.

I inclose two copies of the proposed bill, and also copies of the correspondence relating to the matter.

Very respectfully, your obedient servant,

H. PRICE,
Commissioner.

The SECRETARY OF THE INTERIOR.

KIOWA, COMANCHE AND WICHITA AGENCY,
ANADARKO, IND. T., *January* 22, 1883.

At a general council of the Wichita Indians and other affiliated tribes, convened this day at the office of the agent for the purpose of presenting their claim to all of the country in the Indian Territory lying west of the ninety-eighth meridian and south of the Canadian River, the following was said in open council, as interpreted by William Shirley:

NIASTOR, chief of the Towa·onies, says:

He remembers well, when he was a boy living with his people on the Brazos River, in Texas, that Major Nabors convened a council of Indians there, and told them that they were to possess that country for a home; that it would not be taken away from them; that there would be a school-house built for them and a teacher furnished them, and other promises were made. We lived there a few years in peace until the white people commenced encroaching upon us and making trouble. It was not long after this when Major Nabors told us if we would consent to give up our homes on the Brazos that we would be given a larger country on the north side of Red River. Soon afterwards our chief men went to Arbuckle, invited there to meet three white chiefs from Washington. This was in 1859. Our chief men heard all the promises that were made by the white chiefs at Arbuckle and then returned to our people on the Brazos.

After returning, our chief men called a council of all the Indians then living on the Brazos. O-chil-las, chief of the Towaconies, then told our people what had been said by the white chiefs at Arbuckle. The white chiefs promised that if we would give up our country on the Brazos

the Great Father at Washington would give us a larger country, extending from Red River to the Canadian and from the Chickasaw country to the Antelope Hills, which country should be ours forever.

General Albert Pike was one of the white chiefs at Arbuckle, and knows what promises were made to our chief men.

It was because of the promises there made that our people, and their friends the Wacoes and others, consented to give up their country on the Brazos, leaving their hogs, chickens, and other property behind, and come north to the country promised them.

Our people, after crossing Red River, traveled north until they met their friends the Wichitas on the south side of the Washita River, near where the commissary building now stands; the Wichitas having come up from near Arbuckle. After arriving here, we were shown the country we were to have for our homes, and were told that, with the Wichitas, we should possess it forever.

ES-QUETCH-CHEE, Wichita (Old Man), says:

He is about 85 years of age; was born on Red River not far from the mouth of the Big Wichita. When I was a boy the chief of the Wichitas was killed, and after that my people moved into the Wichita Mountains, and had many villages. When I became a man I moved with some of my people to Rush Springs, east of where Fort Sill is now, where we made farms and had everything plenty; never wanted for anything. We lived there a great many years, quiet and peaceable, until soldiers came there in search of Comanches who were camped near our village, buying corn and watermelons from us, and who had before coming to our village committed depredations on the frontier in Texas.

The soldiers had first searched through the Wichita Mountains, and were under command of Major Van Dorn. When they came to our village they had Towaconie, Waco, Keechi, and Caddo scouts with them. Some days before they came the Towaconie and Waco scouts had been sent out by Major Van Dorn to look for the Comanches. These scouts came to us as friends and relatives, and we told them that there was a large camp of Comanches on Rush Creek a short distance from our village, and that night the scouts left our village without our knowledge, which made us uneasy.

The next day, soon after daylight, the soldiers came, led by the Towaconie and Waco scouts, and had a fight with the Comanches, killing a great many. My people then became afraid, because the Comanches knew the Wacos and Towaconies were friends of ours and had been to our village the day before, and had returned to Major Van Dorn, and told him where the Comanches were camped. We thought it best to abandon our fields of corn and go and live near Arbuckle, until we knew the Comanches would not molest us.

When arriving at Arbuckle we were destitute, having left everything in the way of food at our village on Rush Creek. We asked the commanding officer for rations, telling him we had nothing to eat. We then had beef issued to us, the first we ever received from the white man. We lived a while on Caddo Creek, but moved near Arbuckle, to a clump of timber, where we received beef.

UTS-TUTS-KINS (Wichita):

The following statement was made by Uts-tuts-kins in the spring of 1882, several months before his decease. He was said to have been the oldest member of the Wichita tribe. His statement was written down at the time, as

follows, viz: Tradition says, my people, the Wichitas, long ago came from a far off country and walked down. They used only bows and arrows. Men came in wagons on Missouri River and issued trinkets, &c., to them. After that our people came south; a party went ahead and struck Comanches who had horses; said they had caught them wild; and Wichitas then did the same, which was the first the tribe had.

Afterwards the young chief concluded would all move to Neosho; after living there some time they moved to Salt Fork, and from there to the Red Hills on the North Fork of the Canadian, where they made corn three years, and then moved to mouth of Otter Creek, on North Fork of Red River, and divided into three parties—one to the mouth of the Little Wichita on main Red River, and one to Clear Fork of Brazos, and the other remained at the mouth of Otter Creek.

The chief at mouth of Otter Creek died, and his people joined those at mouth of Wichita, and in five years the chief died at Clear Fork, and his people joined those at mouth of Wichita, and all were together again and lived there a long time. I (Uts-tuts-kins) was born at the mouth of the Wichita. While we lived there white men came in search of money, had a little fight, and whites left.

Afterwards Wichitas disagreed as to where they should stop, but went to mouth of Cache Creek. I was then young. At Cache Creek had trouble with Osages, and wounded our chief in cheek; and then we had small-pox, and lost more than half our people; from there we moved to mouth of Otter Creek. I was then 11 years old. While at mouth of Otter Creek I concluded to go with some young friends on warpath east, and saw no Indians, but when coming home found long trail made by Indians or whites, but when we got home found soldiers holding

council. Soldiers come with boy they had captured at Coffey's Bend on Red River. Our chief said we would some day have to do as whites do. This was just 48 years ago. Moved from Otter Creek to where Fort Sill is now, and remained 6 years. Our big chief was buried there, and we afterwards moved to Rush Springs. We lived there about 8 years when Van Dorn had fight with Comanches near our place; that was in 1858. We then moved to Caddo Creek, near Fort Arbuckle; found Indians and soldiers and considered them intruders, but did not care to make any trouble with them.

The above and foregoing is a correct translation of statement made by Uts-tuts-kins in the spring or summer of 1882.

WM. SHIRLEY,
U. S. Indian Interpreter.

No. 77. Captain R. B. Marcy's exploration of 1852. Sen. Ex. Doc. No. 54, 32d Cong., 2d sess., pp. 69, 77, 84.

Extract.

The particular district embracing the Witchita mountains has for many years been occupied and (with much justice, as it seems to me) claimed by the Witchita Indians, who have a tradition that their original progenitor issued from the rocks of these mountains, and that the Great Spirit gave him and his posterity the country in the vicinity for a heritage, and here they have continued to live and plant corn for a long time.

Notwithstanding this claim of the Witchitas, which the right of occupancy and possession has guarantied to them, yet the whole of this beautiful country as far as the

100th degree of west longitude is included in the grant made by the United States to the Choctaws who thereby possess the greater part of the lands upon the upper Red river that are really valuable.

The Witchitas are an insignificant tribe in point of numbers, not having more than five hundred souls in the nation, and are not of course prepared to substantiate or enforce their title to this country; and, indeed, I very much doubt if they have any claims upon the consideration or generosity of our government, being the most notorious and inveterate horse thieves upon the borders.

We reached the villages (which were situated upon the banks of Rush creek) and encamped about a half a mile below them in the valley. * There are two villages here occupied by the Witchitas and Wacos, respectively. * The village of the Witchitas has forty-two lodges, each containing two families of about ten persons. * With the exception of a few families that live upon the Canadian, the whole Witchita nation is concentrated at this place; their numbers do not exceed five hundred souls. They have, during the early settlement of Texas, been more trouble to the people upon the northern borders of that state than any other Indians. They have no regard for truth, will steal, and are wholly unworthy of the least confidence, and their vicious propensities are only kept in check now from fear.

The Wacos live about a mile above the Witchitas in a village constructed precisely like the other. There are twenty lodges in this village and about two hundred souls; their habits and customs are similar to the Witchitas, with whom they frequently intermarry and are upon the best and most friendly terms. Both of these tribes subsist for a great portion of the year upon buffalo and deer. * They have a large stock of horses and mules, many of

which are the small Spanish breed with the Mexican brand upon them; * while others are large, well-formed animals, and have undoubtedly been stolen from the border white settlers. *

On emerging from the timbered lands upon Red river into the great plains, we pass through a strip of forest called the Cross Timbers. This extensive belt of woodland, which forms one of the most prominent and anomalous features upon the face of the country, is from five to thirty miles wide and extends from the Arkansas river in a southwesterly direction to the Brazos, some four hundred miles. At six different points where I have passed through it I have found it characterized by the same peculiarities, the trees consisting principally of post oak and black-jack, standing at such intervals that wagons can without difficulty pass between them in any direction.

No. 78. From Journal of Dunbar and Hunter, October, 1804.

From this place they proceeded to the mouth of the Washita, in latitude 35° 37′ 7″ N., and encamped on the evening of the 23d.

This river derives its appellation from the name of an Indian tribe formerly resident on its banks; the remnant of which, it is said, went into the great plains to the westward, and either compose a small tribe themselves, or are incorporated into another nation. Am. St. Papers, Ind. Aff., vol. 1, p. 732.

No. 79. Seventh annual report of the Bureau of Ethnology, Washington, D. C., 1891.

Caddoan Family.

* * * * * *

The Pawnee and Caddo, now known to be of the same linguistic family, were supposed, by Gallatin and many later writers, to be distinct; and accordingly both names appear in the Archæologia Americana as family designations. Both names are unobjectionable; but as the term Caddo has priority, by a few pages, priority is given to it. * * The boundaries of the Caddo family, as at present understood, can best be given under three groups, northern, middle and southern.

Northern Group. This comprises the Arikara or Ree. * The Arikara are the remains of ten different tribes of 'Pancas.' * Fort Berthold Reservation, their present abode, is in the northwest corner of North Dakota.

Middle Group. This includes the four tribes or villages of Pawnee, the Grand, Republican, Tapage and Skidi. Dunbar says: 'The original hunting ground of the Pawnee extended from the Niobrara,' in Nebraska, 'south to the Arkansas; but no definite boundaries can be fixed.' In modern times, their villages have been on the Platte river, west of Columbus, Nebraska. *

Southern Group. This includes the Caddo, Wichita, Kichai and other tribes, or villages, which were formerly in Texas, Louisiana, Arkansas, and Indian Territory. The Caddo and Kichai have undoubtedly been removed from their priscan habitats; but the Wichita, judging from the survival of local names (Washita river, Indian Territory, Wichita Falls, Texas), and the statement of La Harpe, are now in, or near, one of their early abodes. * This duplication of names seems to show that the Wichita migrated, from northwestern Louisiana and southwestern Arkansas, to the Indian Territory. After comparing the statements of Dr. Sibley (as above), respecting the habitats

of the Anadarko, Ioni, Nabadache and Eyish, with those of Schermerhorn, respecting the Kädohadacto, of Le Page du Pratz (1758), concerning the Natchitoches, of Tonti and La Harpe about the Yatasi, of La Harpe (as above), about the Wichita, and of Sibley, concerning the Kichai, we are led to fix upon the following as the approximate boundaries of habitat of the southern group of the Caddoan family: Beginning, on the northwest, with that part of Indian Territory now occupied by the Wichita, Chickasaw, Kiowa and Comanche reservations, and running along the southern border of the Choctaw reservation to the Arkansas line; thence, due east, to the headwaters of the Washita, or Witchita, river, Polk County, Arkansas; thence, through Arkansas and Louisiana, along the western bank of that river, to its mouth; thence, southwest, through Louisiana, striking the Sabine river near Salem and Belgrade; thence, southwest, through Texas, to Towak-onay Creek, and, along that stream, to the Brazos river; thence, following that stream, to Palo Pinto, Texas; thence, northwest, to the mouth of the North Fork of Red river; and thence to the beginning.

No. 80. On the 12th of July, 1820, Secretary Calhoun addressed the following letter to General Jackson:

DEPARTMENT OF WAR, *July* 12, 1820.

DEAR SIR: I have received your letter of the 19th ultimo, and am happy to find that you have consented to serve as a commissioner to hold a treaty with the Choctaw Indians, and I herewith enclose your commission and instructions.

I cannot designate particularly the lands which it would be desirable to give to the Choctaws, in exchange for theirs, not being sufficiently acquainted with the localities

of the country, west of the Mississippi, belonging to the United States. In my general letter of instructions to the commissioners, you will observe that they may be located anywhere on the Quapaw purchase, and I should suppose the farther to the south and west the better.

I have the honor to be, &c.,

J. C. CALHOUN.

General ANDREW JACKSON,

Nashville, Tennessee.

The first meeting of the commissioners and Choctaws, in council, occurred October 10, 1820. Only a few Choctaws were present. The minutes of the council, for that day, are printed on pages 235 to 237 of volume 2, American State Papers, Indian Affairs, commencing as follows:

OCTOBER 10, 1820.

In conformity with an appointment made by the commissioners, they met the chiefs, headmen and warriors of the Choctaw nation, in council, this day. They informed them that, although their runners had not returned, yet they had determined to deliver a talk to those now present. They also observed that the same talk would be given to those who were absent, as soon as they arrived. It was as follows: * *

This "talk" contained no reference to the boundaries of the proposed cession.

The Choctaws next met the commissioners, in council, October 14, 1820. The minutes of the commissioners, for October 13, 1820, contain the following entry. Id. p. 238.

OCTOBER 13, 1820.

Puck-she-nub-bee, a principal chief of the nation, informed the commissioners that some of his headmen and warriors were disposed to go into council, and it was the

wish of others to have a ball-play. He stated that he did not wish to mix his businesss, but to do one thing at a time. The commissioners replied that his view of the duty set was a correct one; that if his headmen and warriors were disposed to indulge themselves in amusement, it might be proper to gratify them, as they had no disposition to hurry them, in their determinations. This chief then remarked that they would proceed, on to-day, with the ball-play, and on to-morrow go into council. In the meantime he expressed a wish that the commissioners would furnish their definitive propositions; which were accordingly submitted to them, in manuscript, late this evening. The following is a copy:

CHOCTAW TREATY GROUND, *October* 13, 1820.

Friends and Brothers:

In order to carry into effect the grand and friendly object, which your father, the president of the United States, has in view, for securing the happiness and protection of all his Choctaw children, he proposes to give you a large country west of the Mississippi river. It will be laid off adjoining your Cherokee brothers, so that each can protect and befriend the other. THE LIMITS WILL EXTEND FROM THE ARKANSAS RIVER, WHERE THE CHEROKEE LINE BEGINS, SOUTH TO THE RED RIVER, AND WEST TO THE HEAD SOURCE OF THE ARKANSAS RIVER. Your father, the president, wishes to collect all his Choctaw children, who have already gone over the Mississippi, as well as those who are straggling about in every direction.

No. 81. Copies of papers in the Indian office, contained in a wrapper marked "Papers relating to council held at Fort Smith, 1865."

ADDRESS OF THE COMMISSIONERS.

BROTHERS: After considering your speeches, made yesterday, the Commissioners have decided to make the following reply and statement of the policy of the government:

Brothers: We are instructed by the President to negotiate a treaty, or treaties, with any, or all, of the nations, tribes, or bands of Indians, in the Indian Territory, Kansas, or of the plains west of the Indian Territory and Kansas.

The following named nations, or tribes, have, by their own acts, by making treaties with the enemies of the United States, at the dates hereafter named, *forfeited all right to annuities, lands, and protection by the United States:*

The different nations and tribes having made treaties with the rebel government are as follows, viz:

The Creek Nation, July 10th, 1861; Choctaws and Chickasaws, July 12th, 1861; Seminoles, August 1st, 1861; Shawnees, Delawares, Witchitaws and affiliated tribes, residing in the leased territory, August 12th, 1861; the Comanches of the Prairie, Aug. 12, 1861; the Great Osages, Oct. 2d, 1861; the Senecas, Senecas and Shawnees (Neosho Agency), Oct. 4th, 1861; the Quapaws, Oct. 4th, 1861; the Cherokees, Oct. 7th, 1861.

By these nations having entered into treaties. with the so-called Confederate States, and the rebellion being now ended, they are left without any treaty whatever, or treaty obligation for protection by the United States.

Under the terms of the treaties with the United States, and the law of congress of July 5th, 1862, all these nations and tribes *forfeited and lost all their rights to annuities and lands;* the President, however, does not desire to

take advantage of, or enforce the penalties for, the unwise actions of these nations.

The President is anxious to renew the relations which existed, at the breaking out of the rebellion.

We, as representatives of the President, are empowered to enter into new treaties with the proper delegates of the tribes located within the so-called Indian Territory, and others above-named, living west and north of the Indian Territory.

Such treaties *must* contain substantially the following stipulations:

1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.

2. Those settled in the Indian Territory must bind themselves, when called upon by the government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the territory, and with the United States.

3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes, on an equal footing with the original members, or suitably provided for.

4th. A stipulation, in the treaties, that slavery or involuntary servitude shall never exist in the tribe, or nation, except in punishment of crime.

5th. A portion of the lands, hitherto owned and occupied by you, *must be set apart for the friendly tribes*, now in Kansas, and elsewhere, on such terms as may be agreed upon by the parties and approved by government, or such as may be fixed by the government.

6th. It is the policy of the government, unless other

arrangements be made, that all the nations and tribes, in the Indian Territory, be formed into one consolidated government, after the plan proposed, by the Senate of the United States, in a bill for organizing the Indian Territory.

7th. No white person, except officers, agents and employes of the government, or of any internal improvement authorized by the government, will be permitted to reside in the territory, unless formally incorporated with some tribe, according to the usages of the band.

Brothers: You have now heard and understand what are the views and wishes of the President; and the Commissioners, as they told you yesterday, will expect definite answers, from each of you, upon the questions submitted.

As we said yesterday, we say again, that, in any event, those who have always been loyal, although their nations may have gone over (to) the enemy, will be liberally provided for and dealt with.

The foregoing address bears the following endorsement:

We propose to renew the treaty stipulations that existed previous to, or at the breaking out of, the rebellion, so far as regards the annuities.

The govmt. will insist on purchasing a portion of their lands, for the settlement of friendly Indians.

No part of any moneys expended by the President, in providing for the relief of destitute Indians, which were reduced to want on account of their friendship to the govmt. will be refunded.

A stipulation of general amnesty must be incorporated, and *no individual shall be proscribed, or any act of confiscation, or forfeiture, passed*, against those who remained friendly to the U. S.; but they shall enjoy equal privileges with the other members of the nations.

REPLY OF THE CHOCTAW AND CHICKASAW COMMISSIONERS.

FORT SMITH, ARK., 19*th Sept.*, 1865.

The committee on the part of the Choctaws and Chickasaws reply to the propositions made, on the part of the United States, as the basis of new treaties,

That we are pleased to learn that you propose to renew your previous relations with us, and we are willing to go into negotiations for the making of a new treaty with the United States, and, as a basis of this new treaty, accept Art. 1st and 7th.

In reference to the requirements of the 2d article, we desire to say that we wish, as far as possible, to avoid coming in conflict with our red brethren, should any of them be so unfortunate as to get into conflict with the United States authorities. We are willing to guaranty our influence in favor of peace, in all its bearings, with our red brethren, and will not object to any of our citizens volunteering for service in any war, in which the United States may become involved, for the aiding of the United States.

We are willing to enter into negotiations for the settlement of all the points contained in the 3d and 4th articles.

On certain terms, on which we can doubtless agree with you, *we are willing to admit the settlement of other tribes* within our territory, as proposed in the 5th article.

We are willing to submit the territorial bill, referred to in the 6th article, for the consideration of our respective councils, and, for this purpose, request a copy of that bill for the principal chief of the Choctaw nation, and for the governor of the Chickasaw nation.

We accept art. 7th, and are willing to have the provisions thereof incorporated into the treaty.

We are also willing to incorporate a provision that no

individual shall be proscribed, or any act of forfeiture, or *confiscation, passed*, against those who remained friendly to the U. S., and that they shall enjoy equal privileges with other members of the nation.

R. M. JONES,
Chairman of the Committee of
Choctaw and Chickasaw Comrs.

FORT SMITH, ARK., *Sept. 16th*, 1865.

The Honorable Commissioners on the part of the United States.

GENTLEMEN: The Southern Seminoles have considered the ultimate propositions, so far laid down by you, and cordially assent to all but the third and sixth.

We know the abolition of slavery to be a fact throughout the United States. We are willing to recognize that fact, by the proper acts of our council.

But the proposition to "incorporate" the freed negro with us, on an "equal footing with the original members" of the Seminole tribe, is presented to us so suddenly that it shocks the lesson we have learned, for long years, from the white man as to the negro's inferiority. We honestly think that both the welfare of the Seminole and the freed negro would be injured, if not destroyed, by such "incorporation." The emancipated black man must, of necessity, be "suitably provided for." Such provision requires time and consultation as to how it shall best be done, and we, consequently, beg the indulgence of further time before we decide. We, however, bind ourselves to agree, in good faith, to any wise plan which shall be deemed just and equitable to all parties.

The proposition touching the consolidation of all the tribes and fragments of tribes, into one government, is

one of so great moment and interest to us that we must request time for its due consideration. The plan proposed by the United Senate may be a good one. We have not seen it, but would like to do so and lay it before our council, so as to enable our people to determine thereupon. We will, however, cheerfully agree to any plan which may be adopted by the other nations of the Indian Territory, and sanctioned by the President of the United States.

Our country is a small one and remote. It will neither bear a location, within its borders, of a numerous or an unruly tribe.

Our course, during the past four years has been what we considered an honest one. We were in earnest, in pursuing it. We shall be equally earnest, in fulfilling all relations which we may enter into, in this convention, or hereafter in others, with the United States; and we here announce to you and the government that you may discover that a once earnest enemy can become a better citizen, a more faithful liege, than those who make pretense to fealty on account of interest.

We beg to assure you that we desire nothing more ardently than peace with the United States, peace with our brother Indians, peace among ourselves.

Very Respectfully, Your Obt. Servts.,

James Factor,	his x mark.
Fooshatchee Cochucme,	his x mark.
George Cloud,	his x mark.
Pa-sucah Yohola,	his x mark.
John Brown,	his x mark.

Seminole Delegates.

We, the delegation on the part of the loyal element of the Choctaw people, came here, with the expectation of

meeting our Southern Brethren here, and to see what sort of a treaty would or could be made with the government of the United States. We are not authorized to make, sign, or enter into any treaty stipulations with the government of the United States, on the part of the Choctaw nation; but were selected by the agent for the Choctaw and Chickasaw Indians, by and with the advice and consent of the loyal portion of the Choctaw people, to represent and show to the commissioners on the part of the United States that there are some loyal Choctaws yet, in order that we might not be forgotten or overlooked by the commissioners, but that we might be properly provided for, &c.

In answer therefore to your propositions to the several tribes of Indians, we say that the 1st, 2d, 3d, 4th, 5th and 6th articles meet our approval. We respectfully suggest that the 7th article may be modified or changed to read thus:

No white person, except officers, agents and employes of the government, or of any internal improvement authorized by the government of the United States, also, no person of African descent, except our former slaves, or free persons of color, who are now, or have been, residents of the Territory, will be permitted to reside in the Territory, unless formally incorporated with some tribe, according to the usages of the band.

WM. S. PATTON.
ROBT. B. PATTON.

No. 82. Draft of treaty submitted by the United States commissioners at Fort Smith. (Not signed.)

Articles of agreement and convention between the United States and the Choctaw and Chickasaw tribes of Indians,

made and concluded at Fort Smith, Arkansas, the — day of September, A. D. 1865, by D. N. Cooley, Elijah Sells, Ely S. Parker, and Thomas Wistar, commissioners on the part of the United States, and the delegates of the Choctaw and Chickasaw tribes of Indians, signing this instrument.

Art. 1. Peace and friendship are hereby firmly established between all the citizens of the United States and all the individuals comprising the aforesaid tribes; and all the friendly relations that existed between them before the rebellion, shall be and the same are hereby renewed.

Art. 2. The Choctaw and Chickasaw tribes of Indians do hereby bind themselves to use their influence, and whenever called upon by the Government to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians of the Territory and with the United States.

Art. 3. The Choctaw and Chickasaw tribes of Indians, hereby admit, that the institution of slavery is abolished, and that slavery or involuntary servitude shall never hereafter exist in either tribe, except in punishment of crime, whereof the party shall have been duly convicted, and they promise and agree that measures shall be immediately taken by their respective national councils, to properly provide for such emancipated slaves as may have belonged to the members of the respective tribes; such provision to be subject to the approval of the President of the United States.

Art. 4. The Choctaw and Chickasaw tribes of Indians, hereby agree to open their country to the settlement of friendly Indians from Kansas and elsewhere, upon such terms as may hereafter be agreed upon by the respective parties and approved by the Government, and the Government may settle such friendly Indians on a portion of said

Territory east of the ninety-eighth degree of west longitude, not necessary for the use of said Choctaw and Chickasaw tribes, as it may desire, not exceeding one-third of the whole remaining Territory, for a fair and equitable consideration, to be fixed by the Government.

Art. 5. The Choctaw and Chickasaw tribes agree to a modification of the 9th article of the treaty concluded at the city of Washington, the 22d day of June, A. D. 1855, by which they agree that all that portion of their common territory west of the ninety-eighth degree of west longitude, leased to the United States, may be used for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate thereon, *without exception or restriction as to the character of the tribes.*

Art. 6. The Choctaw and Chickasaw tribes of Indians promise and agree to submit and recommend, at the first meeting of their respective general councils, the adoption of the plan proposed in the Senate bill 459, 38th Congress, 2d session, to provide for the consolidation of the Indian tribes, and to establish civil government in the Indian Territory; it being understood to be the settled policy of the Government of the United States that all the nations and tribes in the Indian Territory be formed into one consolidated government, after the plan proposed in the bill above referred to, adopted by the United States Senate, 1865, the Government of the United States reserving said right.

Art. 7. The United States, in the event of the adoption by the Choctaw and Chickasaw and other Indian tribes of the government proposed to be established in the Indian Territory, referred to in the preceding article, promise and agree that no white person except officers, agents, and employés of the Government, and of any internal im-

provement authorized by the Government, will be permitted to go into and settle in said Territory, unless formally incorporated and naturalized into one of the resident tribes, according to their laws, customs and usages.

Art. 8. The Choctaw and Chickasaw tribes of Indians, anxious for the restoration and preservation of kind and friendly feelings among themselves, do hereby declare a general amnesty of all past offenses, either against their government or the Government of the United States, and no Indian or Indians shall be proscribed, or any act of forfeiture or confiscation passed against those who may have remained friendly and loyal to the United States, but they shall all enjoy equal privileges with other members of said tribes.

Art. 9. The United States hereby promise and agree to restore the Choctaw and Chickasaw tribes of Indians to all their rights and privileges in lands and annuities, that they were possessed of, and entitled to, and they shall be applicable to the same objects as existed at the breaking out of the rebellion, except such part or parts of annuities and moneys as have been expended by the President in providing for the relief of destitute Indians, who were reduced to want on account of their friendship to the Government of the United States, which shall not be refunded.

Art. 10. It is hereby mutually agreed, that all of the provisions of the treaty of June 22d, 1855, between the United States and the Choctaw and Chickasaw tribes of Indians not inconsistent with the foregoing articles are hereby adopted and made a part of this instrument.

Art. 11. The Choctaw and Chickasaw tribes of Indians expressly agree, that any amendment to this treaty, which the Senate of the United States may make, shall be taken and held as a part of the same, and as binding in every

respect as if it had, after being made, been formally submitted to and ratified by such parties. Laws of the Choctaw Nation, p. 410.

No. 83. The commissioners, who represented the United States at the Fort Smith council, in 1865, were D. N. Cooley, Elijah Sells, Thomas Wistar, W. S. Harney and E. S. Parker. Mr. Cooley was president of the council, and was also, at the time, commissioner of Indian affairs. In his annual report for 1865, he said:

With the Choctaws and Chickasaws a treaty was agreed upon, based on the seven propositions heretofore stated, in addition to which these tribes agreed to a thorough friendly union among their own people and forgetfulness of past doings and *the opening of the leased lands to the settlement of any tribes whom the government of the United States might desire to place thereon.* * * * This treaty, after its approval by the councils of the Choctaws and Chickasaws, *is to be signed, in this city, by three delegates from each nation, to be sent here for that purpose.*

No. 84. Report of Commissioner of Indian Affairs for 1865.

The council assembled at Fort Smith, September 8, and delegates were present in the course of the sittings (though not all in attendance at first), representing the Creeks, Choctaws, Chickasaws, Cherokees, Seminoles, Osages, Senecas, Shawnees, Quapaws, Wyandotts, Wichitas, and Comanches.

Immediately upon the opening of proceedings the tribes were informed generally of the object for which the commission had come to them; that they, for the most part

as tribes, had by violating their treaties, by making treaties with the so-called Confederate States, *forfeited all rights under them*, and must be considered *as at the mercy of the Government;* that there was every disposition to treat them leniently, and above all a determination to recognize in a signal manner the loyalty of those who had fought upon the side of the Government, and endured great sufferings on its behalf. On the next day the delegates were informed that the commissioners were empowered to enter into treaties with the several tribes, upon the basis of the following propositions:

1st. That each tribe must enter into a treaty for permanent peace and amity among themselves, each other as tribes, and with the United States.

2d. The tribes settled in the Indian country to bind themselves, at the call of the United States, to assist in compelling the wild tribes of the plains to keep the peace.

3d. Slavery to be abolished, and measures to be taken to incorporate the slaves into the tribes, with their rights guaranteed.

4th. A general stipulation as to final abolition of slavery.

5th. A part of the Indian country to be set apart, *to be purchased for the use of such Indians* from Kansas or elsewhere, as the Government may desire to colonize thereon.

6th. That the policy of the Government to unite all the Indian tribes of this region into one consolidated government should be accepted.

7th. That no white person, except Government employés, or officers or employés of internal improvement companies, authorized by Government will be permitted to reside in the country, unless incorporated with the several nations. Page 34.

Printed copies of the address of the Commissioners were placed in the hands of the agents, and of members of the tribes, many of whom were educated men. Page 35.

It being certain that no final treaties could be now concluded with the tribes represented, for the reason that, until the differences between the loyal and disloyal portions were healed, there could be no satisfactory representation of most of them, it was determined to prepare for signature by the commission, and by the delegates representing all factions and opinions, a preliminary treaty, pledging anew, on behalf of the Indians, allegiance to the United States, and repudiating all treaties with other parties; and, on the part of the United States, agreeing to re-establish peace and friendship with them. This was considered essential as preliminary to the main business of the commission; to wit; to make peace between the several tribes and negotiations as to purchasing lands, territorial government, &c. This work was diligently pursued until, on the breaking up of the commission on the 13th day, all of the delegates representing the following tribes and sections of tribes, in the order given, had signed treaties (some of them holding out for several days, until they could agree among themselves) Senecas, Senecas and Shawnees, Quapaws, loyal Seminoles, loyal Chickasaws, loyal Creeks, Kansas, Shawnees, (uncalled for, but asking to be permitted again to testify their allegiance) loyal Osages, tribes of the Wichita agency, loyal Cherokees, disloyal Creeks, disloyal Cherokees, disloyal Osages, Comanches, disloyal Choctaws and Chickasaws. Page 35.

With the Choctaws and Chickasaws a treaty was agreed upon upon the basis of the seven propositions heretofore stated, and, in addition to which, those tribes agreed to a thorough and friendly union among their own people, and forgetfulness of past differences; to the opening of the "leased lands" to the settlement of any tribes whom the government of the United States may desire to place thereon; and to the cession of one-third of their remain-

ing area for the same purpose; the United States to restore these tribes to their rights forfeited by the rebellion. This treaty, after its approval by the councils of the Choctaws and Chickasaws, is to be signed in this city by three delegates from each nation sent here for that purpose. Page 36.

No. 85. Fort Smith Council. Original manuscript report. (See No. 81.)

Mr. Cooley, the president of the commission, said to the delegates, or agents, of the Indians:

The agents will be supplied with printed copies of the address, and *are requested to go, with an interpreter, to their respective tribes, for the purpose of fully explaining what is said there.*

The minutes of the council for September 21, 1865, contain the following entry:

At 2 o'clock p. m. the council met, pursuant to adjournment. Called to order by President Cooley. Commissioner Parker stated that the joint committee of the Choctaw and Chickasaw delegations had reported to the committee of the commission certain amendments and modifications of the proposed treaty; that the commission had had the same under consideration, and the commissioners declined to accede to them, or to change, in any respect, the treaty as submitted. The delegations would be furnished with a copy of the treaty, and, whenever they determined to approve it, by notifying the Commissioner of Indian Affairs of the fact, they would be invited to come to Washington to consummate the treaty.

No. 86. Official report of Fort Smith Council.

Brothers: After considering your speeches, made yesterday, the commissioners have decided to make the following reply and statement of the policy of the government.

Brothers: We are instructed, by the President, to negotiate a treaty, or treaties, with any, or all, of the nations, tribes, or bands of Indians, in the Indian Territory, Kansas or the plains west of the Indian Territory and Kansas.

* * * * * *

The President is anxious to renew the relations, which existed at the breaking out of the rebellion.

We, as representatives of the President, are empowered to enter into new treaties, with the proper delegates of the tribes located within the so-called Indian Territory, and others above named, living west and north of the Indian Territory.

Such treaties *must* contain substantially the following stipulations:

1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.

2. Those settled in the Indian Territory must bind themselves, when called upon by the Government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory, and with the United States.

3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes, on an equal footing with the original members, or suitably provided for.

4. A stipulation, in the treaties, that slavery or invol

untary servitude shall never exist, in the tribe, or nati
except in punishment of crime.

5. A portion of the lands, hitherto owned and occupi
by you, *must be set apart for the friendly tribes* now
Kansas and elsewhere, on such terms as may be agre
upon by the parties and approved by government, or su
as may be fixed by the government.

6. It is the policy of the government, unless other a
rangements be made, that all the nations and tribes,
the Indian Territory, be formed into one consolidated go
ernment, after the plan proposed by the senate of t
United States for organizing the Indian Territory.

7. No white person, except officers, agents, and em
ployés of the government, or of any internal improv
ment authorized by the government, will be permitted
reside in the Territory, unless formally incorporated wit
some tribe, according to the usages of the band.

Brothers: You have now heard and understand wh
are the views and wishes of the president; and the com
missioners, as they told you yesterday, *will expect defini
answers* from each of you, upon the questions submitted

This address, in manuscript, in the Indian office, bear
the following indorsement:

We propose to renew the treaty stipulations that ex
isted previous to, or at the breaking out of, the rebellion
so far as regards the annuities.

*The government will insist on purchasing a portion o
their lands for the settlement of friendly Indians.*

No part of any moneys expended by the president, i
providing for the relief of destitute Indians, which wer
reduced to want on account of their friendship for th
government, will be refunded.

A stipulation of general amnesty must be incorporated, *and no individual shall be proscribed, or any act of confiscation, or forfeiture, passed,* against those who remained friendly to the U. S.; but they shall enjoy equal privileges with the other members of the nations.

To this address the Choctaw and Chickasaw delegates made a reply, as follows:

The committee, on the part of the Choctaws and Chickasaws, reply to the propositions made on the part of the United States, as the basis of new treaties that * * On certain terms, on which we can doubtles agree with you, we are willing to admit the settlement of other tribes within our territory, *as proposed in the 5th article.*

The following reply to the address was also made:

We, the delegation on the part of the loyal element of the Choctaw people, came here with the expectation of meeting our southern brethren here, and to see what sort of a treaty would, or could, be made with the government of the United States. * * *

In answer, therefore, to your propositions to the several tribes of Indians, we say that the first, second, third, fourth, *fifth*, and sixth articles meet our approval. We respectfully suggest that the seventh article may be changed to read thus:

"No white person, except officers, agents, and employés of the government or of any internal improvement company authorized by the government of the United States; also no persons of African descent, except our former slaves or free persons of color who are now or have been residents of the territory, will be permitted to reside in the territory, unless formally incorporated with some tribe according to the usages of the band."

Mr. Cooley, the president of the commission, said to the delegates, or agents, of the Indians:

The agents will be supplied with printed copies of the address, and are requested to go, with an interpreter, to their respective tribes, for the purpose of fully explaining what is said there.

The minutes of the council for September 21, 1865, contain the following entry:

At 2 o'clock p. m. the council met, pursuant to adjournment. Called to order by President Cooley. Commissioner Parker stated that the joint committee of the Choctaw and Chickasaw delegations had reported to the committee of the commission certain amendments and modifications of the proposed treaty; that the commission had had the same under consideration, and the commissioners declined to accede to them, or to change, in any respect, the treaty as submitted. The delegations would be furnished with a copy of the treaty, and, whenever they determined to approve it, by notifying the Commissioner of Indian Affairs of the fact, they would be invited to come to Washington to consummate the treaty. In anticipation of the speedy termination of the council, Commissioner Parker, on behalf of the commission, returned thanks to the various delegations then present, for their attendance, and wished them a happy journey home.

After some congratulatory remarks, by Delegate R. M. Jones, R. Field, E. C. Boudinot and Commissioner Cooley, President Cooley adjourned the council and the commission, to meet again, at the call of the secretary of the interior.

CHARLES E. MIX, *Secretary.*

No. 87. Report of the president of the Fort Smith council.

The council was called to order by me as president of the commission; after which the blessing of the Great Spirit over our deliberations was invoked by Rev. Lewis Downing, acting chief of the Cherokee nation. When Mr. Downing had concluded I addressed the council as follows:

Brothers: It is proper that thanks should be returned to the Great Spirit, the creator of us all, that our lives have been preserved to meet on this occasion. * *

Portions of several tribes and nations have attempted to throw off their allegiance to the United States, and have made treaty stipulations with the enemies of the government, and have been in open war with those who remained loyal and true, and at war with the United States. All such have rightfully *forfeited all annuities and interests in lands* in the Indian territory. But, with the return of peace, after subduing and punishing severely, in battle, those who caused the rebellion, the president is willing to hear his erring children *in extenuation of their great crime.* He has authorized us to make new treaties with such nations and tribes as are willing to be at peace among themselves and with the United States. Documents accompanying Commissioner's report for 1865, p. 296.

On the second day (Saturday, September 9,) after council met, I addressed the Indians, in which I stated that the commissioners had considered the talks of the Indians on the preceding day, and had authorized me to submit the following statement and propositions, as the basis on which the United States were prepared to negotiate with them:

Brothers: We are instructed, by the president, to nego-

tiate a treaty, or treaties, with any, or all, of the nations tribes, or bands of Indians, in the Indian Territory Kansas or the plains west of the Indian Territory and Kansas.

The following named nations and tribes have, by their own acts by making treaties with the enemies of the United States, at the dates hereafter named, *forfeited all right to annuities, lands and protection* by the United States. * *

Under the terms of the treaties with the United States, and the law of congress of July 5, 1862, all these nations and tribes *forfeited and lost all their rights* to annuities and lands. The President, however, does not desire to take advantage of or enforce the penalties for the unwise actions of these nations.

The President is anxious to renew the relations, which existed at the breaking out of the rebellion.

We, as representatives of the president, are empowered to enter into new treaties, with the proper delegates of the tribes located within the so-called Indian Territory, and others above named, living west and north of the Indian Territory.

Such treaties *must* contain substantially the following stipulations:

1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.

2. Those settled in the Indian Territory must bind themselves, when called upon by the government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory, and with the United States.

3. The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and

measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes, on an equal footing with the original members, or suitably provided for.

4. A stipulation, in the treaties, that slavery or involuntary servitude shall never exist, in the tribe, or nation, except in punishment of crime.

5. A portion of the lands, hitherto owned and occupied by you, *must be set apart for the friendly tribes, in Kansas* and elsewhere, on such terms as may be agreed upon by the parties and approved by government, or such as may be fixed by the government.

6. It is the policy of the government, unless other arrangements be made, that all the nations and tribes, in the Indian Territory, be formed into one consolidated government, after the plan proposed by the senate of the United States for organizing the Indian Territory.

7. No white person, except officers, agents, and employés of the government, or of any internal improvement authorized by the government, will be permitted to reside in the territory, unless formally incorporated with some tribe, according to the usages of the band.

Brothers: You have now heard and understand what are the views and wishes of the president; and the commissioners, as they told you yesterday, *will expect definite answers* from each of you, upon the questions submitted. Id., pp. 297, 298, 299.

No. 88. Extract from report of Commissioner of Indian Affairs, Oct. 31, 1865, page 204.

The terms of a treaty were agreed upon with both parties of the Creeks, whereby they cede to the United States, for the use of the friendly Indians from Kansas or else-

where, all of their lands north of the Arkansas river, a
one-half of the remainder lying south of that river, o
terms which I trust will meet the approval of the gover
ment. This treaty is to be signed in this city by delegat
properly accredited by the united Creek Nation. Messag
and Documents, Interior and P. O. Depts. 1865–1866.

No. 89. Extract from the report of Hon. Elijah Sell
Sup't Indian Affairs, southern superintendency, Octobe
16, 1865.

The Wichita and affiliated tribes, numbering not fa
from two thousand eight hundred, or three thousand
have no place they can claim as their rightful home
They have been living upon what is known as the reserva
tion or leased lands in the Indian Territory, situat
between niety-eight and one hundred degrees west longi
tude, and between the Canadian River and the northern
line of Texas, by sufferance of the United States govern
ment. * *

I would recommend that provision be made for remov
ing the refugee Wichita Indians in Kansas to a new home
in the southern portion of the Indian Territory, where
lands may be set apart for their permanent occupation.
Mess. and Doc. Int. and P. O. Dept. 1865–6, pp. 443, 444.

No. 90. Extract from Report of the Secretary of the
Interior of December 4, 1865, page 7.

This state of things continued until the surrender of the
rebel forces west of the Mississippi. Hostilities were
then suspended, and, at the request of the Indians, com-
missioners were sent to negotiate a treaty of peace. Such
preliminary arrangements were made as, it is believed,
will result in the abolition of slavery among them, the

cession within the Indian Territory of lands for the settlement of the civilized Indians now residing on reservations elsewhere, and the ultimate establishment of civil government, subject to the supervision of the United States.

No. 91. The select committee of the Senate, in its report on the removal of the northern Cheyennes, referring to the lands set apart for the Cheyennes and Arapahoes by the executive order of August 10, 1869, say that "it was never intended to be more than a temporary abiding place for these tribes, where they were to stop until the United States could extinguish the claim of the Cherokees to the lands included in the treaties with the Arapahoes and Cheyennes." Sen. Rep. No. 48, 46 Cong., 2d Sess., page 2.

No. 92. The commissioner of Indian affairs, who presided in the negotiation of the treaty of 1866, in his report for 1866, relating to that treaty, said:

Four principal points came up for settlement, to wit: * Cession of lands by the several tribes, to be used for the settlement thereon of Indians whom it is in contemplation to remove from Kansas. * The first tribe, with which arrangements were consummated, were the Seminoles. * The Indians cede the government the entire domain secured to them by the treaty of 1856. * The next treaty, in this series, was made with the confederate nations of Choctaws and Chickasaws. * The Indians cede to the government the whole of that tract of land known as the leased lands. *

No. 93. The secretary of the interior in an official communication dated May 1, 1879, said:

* The title acquired by the government, by the treaties of 1866, was secured in pursuance and furtherance of the same purpose of Indian settlement, which was the foundation of the original scheme. That purpose was the removal of Indian tribes from the limits of the political state and territorial organizations, and their present permanent location upon other lands sufficient for the needs of each tribe. These lands being ample in area for the purpose, it has become a settled policy to locate other tribes thereon, as fast as arrangements can be made; and provision has been constantly made, by treaties, agreements and acts of congress, to effect these objects.

That purpose is expressly declared in the said treaties. The cessions of the Creeks and Seminoles are stated to have been made, "in compliance with the desire of the United States to locate other Indians and freedmen thereon." These words must be held to create a trust equivalent to what would have been imposed had the language been, "for the purpose of locating Indians and freedmen thereon."

The lands ceded by the Choctaws and Chickasaws were, by article 9 of the treaty of June 22, 1855, "leased to the United States, * for the permanent settlement of the Wichita and such other tribes, or bands, of Indians, as the government may desire to locate therein." *The treaty of* 1866 *substituted a direct purchase for the lease, but did not extinguish or alter the trust.*

No. 94. In the president's proclamation of February 12 1880, relating to the Indian Territory, he says:

Which territory is designated, recognized, and described by the treaties and laws of the United States,

and by the executive authorities, as Indian country, and, as such, *is subject only to occupation by Indian tribes*, officers of the Indian department, military posts, and such persons as may be privileged to reside and trade therein, under the intercourse law of the United States

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No. 95. A report of the acting commissioner of Indian affairs, dated April 25, 1881, contains the following statement:

The Choctaw and Chickasaw cession of April 28 1866, (14 Stats. 769) was, by the tenth section thereof, made subject to the conditions of the compact of June 22, 1855, (11 Stats. 613) by the ninth article of which it is stipulated that the land should be appropriated for the permanent *settlement of such tribes or bands of Indians* as the United States might desire to locate thereon.

The title of the United States to lands in the Indian territory is, as heretofore shown, subject to a specific trust; and it is not within the lawful power of either the legislative, or executive, department of the government to annihilate such trust, or to avoid the obligations arising therefrom. Sen. Ex. Doc. No. 111, 47 Cong., 1st Sess.

No. 96. The report of the Indian office, transmitted by the secretary of the Interior to the president, February 17, 1882, contains the following statements:

The lands to which the United States holds the legal title, within the Indian Territory, are reserved, by treaty stipulation and acts of congress, and are not, and never have been, public lands subject to general occupation.

The treaties, by which the United States acquired title to any of the lands in the Indian Territory, or obtained the conditional right to control the disposal of any

of said lands, were the treaties with the Seminoles of March 21, 1866, with the Choctaws and Chickasaws of April 28, 1866, with the Creeks of June 14, 1866, and with the Cherokees of July 19, 1866.

The lands reconveyed to the United States by the foregoing treaties are, therefore, held subject to the trust named. They can be appropriated only to the uses specified, and to those only by the United States, and then only in the manner provided by law. Miscellaneous immigration, even by the intended beneficiaries, would be unauthorized and illegal.

The Choctaw and Chickasaw cession of April 28, 1866 (14 Stats. 769), was by the tenth section thereof made subject to the conditions of the compact of June 22, 1855 (11 Stats. 613), by the ninth article of which it was stipulated that the lands should be appropriated for the permanent *settlement of such tribes, or bands, of Indians* as the United States might desire to locate thereon.

The title of the United States to lands in the Indian Territory is, as heretofore shown, subject to specific trusts, and it is not within the lawful power of either the legislative, or executive, departments of the government, to annihilate such trusts, or to avoid the obligation arising thereunder. Such trusts are for the benefit of Indian tribes and Indian freedmen.

No. 97. A report of the Indian office, dated January 31, 1884, transmitted by the secretary of the interior to the senate, contains the following statement relating to the Indian Territory:

No part of said territory remains free from appropriation either to a direct trust, assumed by treaty, or by reservations for tribes thereon under executive order, except that portion still claimed by the state of Texas, and lying between Red river and the north fork of the same.

No. 98. On the 14th of February, 1884, the secretary of the interior, in response to a resolution of inquiry adopted by the senate, said :

These lands were acquired by treaties with the various Indian nations or tribes in that territory in 1866, to be held for Indian purposes, and to some extent for the settlement of the former slaves of some of said nations, or portions thereof. Such are the purposes for which said lands are now being used or held according to the common understanding of the objects of the treaties by which they were acquired, and from these arise the necessity for, or obligation to keep said lands in their present condition of occupancy or otherwise.

No. 99. A proclamation of the president, dated July 1, 1884, relating to the Indian Territory, contains the following statement :

Which territory is designated, recognized, and described by the treaties and laws of the United States and by the executive authorities as Indian country, and as such is subject to Indian occupation only.

No. 100. An official report of the Indian office, dated January 26, 1885, contains the following :

The title acquired by the government, by the treaties of 1866, was secured in pursuance and furtherance of the same purpose of Indian settlement which was the foundation of the original scheme. That purpose was the removal of Indian tribes from the limits of the political state and territorial organizations, and their permanent location upon other lands sufficient for the needs of each tribe.

These lands being ample in area for the purpose, it

has become a settled policy to locate other tribes thereon, as fast as arrangements can be made, and provisions have been constantly made, by treaties, agreements, and acts of congress, to effect these objects.

No. 101. In an official communication from the secretary of the interior to the president relating to the Indian Territory, dated January 26, 1885, the secretary refers to a former decision, "that no part of said territory remains free from appropriation, either to a direct trust assumed by treaty, or by reservations for tribes thereon under executive order, except that portion still claimed by the state of Texas and lying between Red river and the North fork of the same," and says:

This status of the land, as thus determined, has been adhered to by this department; and on April 26, 1879, February 12, 1880, and in July, 1884, proclamations were issued by the president, warning unauthorized persons against going upon these lands.

Objection will be made to the occupation of any part of the Indian Territory by other than Indians, on the ground that the government set apart the territory for the exclusive use of the Indians and covenanted that no others should reside therein. It is not denied that the treaties so provide. It is, however, within the power of the government, with the consent of the Indians interested, to change this provision of the treaties so that these desirable unoccupied lands may be placed within the lawful reach of the settlers.

No. 102. A communication from the Indian office to the committee on Indian affairs of the house of representatives, dated September 13, 1890, contained the following statement:

It is possible that the commission, when it came to negotiate with the Choctaws and Chickasaws, may have omitted from the treaty with those Indians a similar condition and reservation regarding the purposes for which the lands were to be used, because of the fact that the United States had secured by a prior treaty a lease, which amounted to a permanent lease, of the lands in question for Indian purposes, for which, together with other considerations, it had paid the sum of $800,000. Considering this fact, the commission negotiating the treaty may have considered the payment of the $300,000 additional, as provided for in the treaty of 1866, a sufficient compensation for an absolue cession of all right, title, and interest that the Choctaws and Chickasaws had in and to the said "leased district." This conclusion, however, cannot be fairly reached, when the record of the negotiations is fully considered; for we have already seen that these Indians accepted the terms proposed by the commission, upon which the treaties would be negotiated; and these very terms indicate the purpose for which the ceded lands were to be used. And it shows quite clearly that the Indians understood that they were parting with whatever right, title, and interest remained to them in the "leased district" to the United States, to be used for the location and settlement of other Indians thereon.

The negotiations made about that time by the United States with Indian tribes show very conclusively that a policy had been carefully mapped out for the acquisition by the United States of the right to locate other Indians upon portions of the lands owned and occupied by the five civilized tribes in the Indian territory.

I am inclined, therefore, to the opinion that the Choctaw and Chickasaw Indians have good ground for the claim that the United States took the land ceded by them

upon the trust to settle other Indians and freedme thereon, as the policy upon which the negotiations wer made clearly indicated its desire and purpose to do.

While there are clearly no words of limitation in th treaty of 1866 as to the use to which the ceded land should be put by the United States, the history of th negotiation preceding and resulting in that treaty and th subsequent treatment of the subject quite clearly indicat that the Choctaws and Chickasaws have good ground fo claiming that they understood that the lands were to b used for the location of other Indians and freedme thereon.

No. 103. On the fourth of June, 1891, an agreement wa made between the United States and the Wichita an affiliated bands of Indians, in which the lands in contro versy were described as follows:

Commencing at a point in the middle of the mai channel of the Washita river, where the ninety-eight meridian of west longitude crosses the same, thence u the middle of the main channel of said river to the line o 98° 40′ west longitude, thence on said line of 98° 40′ du north to the middle of the channel of the main Canadia river, thence down the middle of said main Canadian rive to where it crosses the ninety-eighth meridian, thence du south to the place of beginning.

The lands so described are situated in the northern par of the leased district.

No. 104. Extracts from the journal of the commissioner who negotiated the treaty of August 24, 1835. Now o file in Indian office.

FORT GIBSON, *May 7th*, 1835.

The board met. Present M. Stokes, M. Arbuckle.

Appointed Col. A. A. Chouteau interpreter of the Osage language, and sent an express, with the request that he bring us, from Clermont's (Osage chief's) town, the two Towee-ash and one Wacho Indians, together with the Towee-ash woman, to be used as an interpreter.

FORT GIBSON, *May 10th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle.

Col. Chouteau arrived, with the three Indians, from the Towee-ash and Wacho villages, and the Towee-ash woman.

FORT GIBSON, *May 11th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle.

Held a talk with the three Western Indians, on the subject of the proposed treaty with the Comanches and other tribes. The Osage second chiefs, Black Dog and Tally, were present.

FORT GIBSON, *May 12th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle.

Held a council with the three Western Indians, in presence of Black Dog, Tally, and others of the Osage nation. Explained to the Indians the views of the government of the United States, in proposing a treaty with the Comanche and other wandering nations and tribes, on the western frontier.

FORT GIBSON, *May 13th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle, F. W. Armstrong.

Held a further council with the three Western Indians, in presence of, and assisted by, Black Dog, Tally, and other Osages.

FORT GIBSON, *May* 14*th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle, F. W. Armstrong.

Held a further council with the three Western Indians and the principal Indians present of the Osages. Considered it proper that Maj. Mason, with a party of dragoons, should proceed to the head of Little River of the Canadian, and select a suitable place for having an interview with the chiefs of the Comanches and other tribes of the western frontier. Determined to send the three western Indians, Col. Chouteau, the Towee-ash woman and three Osage Indians with Maj. Mason. Engaged Tally for this purpose. Engaged the three Towee-ash and Wacho Indians, to assist in bringing in the chiefs of the Comanche tribes to Fort Gibson, for the purpose of making the proposed treaty. Wrote a letter to the secretary of war, informing him of these arrangements.

FORT GIBSON, *May* 15*th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle, F. W. Armstrong.

Held a further council with the three western Indians and a number of the Osages. * *

FORT GIBSON, *May* 16*th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle.

Made arrangements for the departure of the western Indians with the Towee-ash woman. * *

FORT GIBSON, *May* 20*th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle.

This day dispatched Col. Chouteau, with Nack, the principal Towee-ash, and his two companions, with the Towee-ash woman Ascinka, who crossed the Arkansas river, and joined Maj. Mason on the western expedition.

FORT GIBSON, *July 11th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle, commissioners.

* * The board appointed the 20th of August, for holding the treaty with the western Indians, at Camp Holmes, near western borders of the Cross Timbers, in the Creek nation, and requested Genl. Arbuckle to direct Maj. Mason to notify the Prairie Indians to attend there, at that time.

FORT GIBSON, *August 6th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

The board agreed on leaving Fort Gibson, this day, for the treaty ground, at Camp Holmes.

CAMP HOLMES, *August 19th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

The commissioners reached Camp Holmes this day, and assembled the Comanche and Witchita chiefs. * * *

CAMP HOLMES, *August 24th*, 1835.

The board met. Present: M. Stokes, M. Arbuckle, commissioners; W. Seawell, secretary.

The board was this day occupied in obtaining the signatures of the chiefs and representatives of the Comanche, Witchita, Cherokee, Muskogee, Choctaw, Osage, Seneca, and Quapaw nations or tribes of Indians.

No. 105. In answer to questions proposed by President Jackson, Attorney General Taney on the 1st of November, 1831, said:

The language of that clause in the treaty, which gives the president the power to pay fifty cents, an acre, for

reservations, would, according to its strict and literal interpretation, seem to imply that the reservations for the chiefs, and others named in the treaty, were not embraced in this provision. But it is manifestly for the interest of the Choctaws, that this power of purchase, by the government, should exist as to all the reservations; because, if the persons entitled are unable to sell before their removal, and prefer accepting the fifty cents, per acre, rather than wait for an individual purchaser, it enables the government to give them this compensation, as soon as they arrive at their new homes, when, for the most part, it would be very convenient for them to receive it.

In an instrument of this sort, and made with such persons as the Choctaws, I do not think that strict and technical rules of construction should be applied to it. It ought to be expounded liberally according to its spirit, so as to give the Indians all the advantages and facilities, in their removal, which appear to have been contemplated by the general scope and spirit of the treaty. And this rule of construction is sanctioned by the clause, at the end of the 8th article, which stipulates that, whenever well founded doubts shall arise, it shall be construed most favorably towards the Choctaws. And, regarding the subject in this light, and looking to the objects of the treaty, I think that, according to a fair and liberal interpretation of its terms and provisions, the president has the power to accept, from any of the chiefs named, a relinquishment of his title, and to direct him to be paid fifty cents per acre for it. 2 Opin. Atty. Genl. 467.

No. 106. In their memorial to the senate and house of representatives of the United States, presented in the senate March 19, 1890, the Chickasaws said:

And the Chickasaws, finding that these people were likely to outnumber the Chickasaws, and, if made citizens, to take possession of their government, were compelled to refuse and did refuse to confer upon them Chickasaw citizenship, and therefore failed to earn, or receive, any part of the stipulated sum of $300,000. On the contrary, a part of that sum, which was loaned to the Chickasaws, in 1866, in pursuance of article 46 of the treaty has been reported, and correctly reported, by the Indian office, as a charge against the trust fund of the Chickasaw nation.

No. 107. Senate Report 1st Session 30th Congress, page 35.

WASHINGTON CITY, D. C.,
August 8, 1846.

SIR: * * The other little bands, viz: Witchataws, Towzash, Toneconies, Keechies and Wacoes are inconsiderable in number, and degenerate in character. * * The Witchataws and Towzash live on the north side of Red River, in the Witchataw mountains. The other three tribes reside upon the Brazos, about one hundred miles above the Comanche Peak. They informed us they had lost their numbers, by the small pox and repeated wars with the Texans. They have the reputation of being the best horse thieves in the prairie. * *

P. M. BUTLER,
Indian Commissioner.
M. G. LEWIS,
Indian Commissioner.

HON. W. MEDILL,
Commissioner of Indian Affairs, Washington, D. C.

Senate Report No. 171, 1st Session, 30th Congress, page 47.

BUREAU OF INDIAN AFFAIRS,
CITY OF HOUSTON, *November* 3, 1838.

SIR: * * The Pawnee Picts, or Toweashes, reside on Red River; they are sometimes in the United States and sometimes in Texas. The portion of the tribe which visits this country amounts to about 300 souls, with 60 or 75 warriors. They are in alliance with the Wacoes and Caddoes, and their depredations are generally confined to the Upper Brazos county. * *

I have the honor to be,
Very Respectfully,
Your Obedient Servant,
GEORGE W. BONNELL,
Commissioner Indian Affairs.

To the Hon. SECRETARY OF WAR
of the Republic of Texas.

No. 108. On the 17th of February, 1882, the Secretary of the Interior communicated to the Senate of the United States a decision of the Commissioner of the General Land Office, containing the following statement:

The Choctaw and Chickasaw cession of April 28, 1866 (14 Stat. 769), was, by the tenth section thereof, made subject to the conditions of the compact of June 22, 1855 (11 Stat. 613), by the ninth article of which it was stipulated that the land should be appropriated for the permanent settlement of such tribes or bands of Indians as the United States might desire to locate thereon. The lands embraced in the Choctaw and Chickasaw cession were also included in a definite district, established by the stipulations of the treaty of 1855, pursuant to the act of Congress of May 28, 1830, the United States reëngaging, by the seventh article of the said treaty, to remove and keep out from that district all intruders.

In pursuance of the stipulations of the foregoing compacts, and in the exercise of the trusts assumed by the United States, under the several treaties, and in accordance with specific provisions of law and the lawful orders of the President, all the lands in the Indian Territory to which the United States has title have been permanently appropriated or definitely reserved for the uses and purposes named. The title of the United States to lands in the Indian Territory is, as heretofore shown, subject to specific trusts, and it is not within the lawful power of either the legislative or executive departments of the Government to annihilate such trusts, or to avoid the obligations arising thereunder. Such trusts are for the benefit of Indian tribes and Indian freedmen. Senate Rep. No. 552, 52d Cong., 1st Sess., pp. 13, 14.

No. 109. In response to a Senate resolution of January 23, 1884, the Secretary of the Interior transmitted to the President of the Senate the following communication:

SIR: I have the honor to acknowledge receipt of Senate resolution of January 23 last, directing the Secretary of the Interior—

"To advise the Senate of the present status of lands in the Indian Territory, other than those claimed and occupied by the five civilized tribes, the extent of each tract separately, the necessity for or obligation to keep said lands in their present condition of occupancy or otherwise, and as to whether any portion of said lands, and if so, what portion, are subject to entry under the land laws of the United States, and as to what portion, if any, could be made so subject to entry by the action of the Executive."

These lands were acquired by treaties with the various Indian nations or tribes in that Territory in 1866, to be

held for Indian purposes and to some extent for the settlement of the former slaves of some of said nations, or portions thereof.

Such are the purposes for which said lands are now being used or held, according to the common understanding of the objects of treaties by which they were acquired; and from these arise the necessity for or obligation to keep said lands in their present condition of occupancy or otherwise. Senate Rep. No. 552, 52d Cong., 1st sess., p. 14.

No. 110. Communication of Commissioner of Indian Affairs to Secretary of Interior, January 31, 1884.

This being the condition of things, it is clear that no authorized settlement could be made by any persons in the Territory, except under the provisions of the intercourse laws, such persons having first obtained the permission provided for in those statutes. It may be further stated that no part of said Territory remains free from appropriation either to a direct trust assumed by treaty or by reservations for tribes thereon under executive order, except that portion still claimed by the state of Texas and lying between the Red River and the North Fork of the same. House Rep. No. 3147, 51st Cong., 1st Sess., p. 24.

No. 111. Communication from Secretary of Interior to United States Senate, Feb. 14, 1884.

These lands were acquired by treaties with the various Indian nations or tribes in that Territory in 1866, to be held for Indian purposes, and to some extent for the settlement of the former slaves of some of said nations, or portions thereof. Such are the purposes for which said lands are now being used or held according to the

common understanding of the objects of the treaties by which they were acquired, and from these arise the necessity for, or obligation to keep said lands in their present condition of occupancy or otherwise. Sen. Ex. Doc. 109, 48th Cong., 1st ses.

No. 112. The following is taken from a report made to Congress in this case by the Indian Office September 13, 1890:

The records of this office show that in 1865 a commission was appointed to negotiate with the Indians of the then Southern Superintendency, among them the Choctaws, Chickasaws, Creeks, Seminoles, and Cherokees. * * * A council was held between this commission and representatives of the Southern Indians at Fort Smith, Ark., in September, beginning on the 8th and ending on the 21st day of that month. On the 9th of September, 1865, the president of the commission, Hon. D. N. Cooley, who was also at that time Commissioner of Indian Affairs, addressed the council, * * * and declared * * * that, as the representatives of the President of the United States, the commission, for which he spoke, was empowered to enter into new treaties with the proper delegates of the tribes located within the Indian Territory and others above named living west and north of Indian Territory; that such treaties must contain substantially the following stipulations, viz:

* * * * * *

"Fifth. A part of the Indian country to be set apart to be purchased for the use of such Indians from Kansas and elsewhere as the Government may desire to colonize therein.

"Sixth. That the policy of the Government to unite all

the tribes of this region into one consolidated government should be accepted.

"Seventh. No *white person*, except officers, agents, and employés of the Government, or of any internal improvement company authorized by the Government, will be permitted to reside in the Territory, unless formally incorporated with some tribe according to the usage of the band."

On September 11, 1865, in a letter addressed to the commissioners of the United States, the Choctaw delegates said: "In answer, therefore, to your propositions to the several tribes of Indians, we say that the first, second, third, fourth, fifth, and sixth articles meet our approval;" and submitted in lieu of the seventh proposition a proposition which provided that "no white person, except officers, agents, employés of the Government, or of any internal improvement company authorized by the Government of the United States; also, no person of African descent, except our former slaves, or free persons of color who are now or have been residents of the Territory, will be permitted to reside in the Territory unless formally incorporated with some tribe according to the usages of the band."

Later, in the progress of the council, about the 18th of September, the commissioners of the southern factions of the Choctaw and Chickasaw tribes accepted the propositions suggested by the commissioners, and before the final adjournment of that council, the 21st of September, all of the delegates of the tribes represented signed a treaty of peace between themselves and the United States. (These proceedings will be found in the Annual Report of the Indian Bureau, 1865, p. 105, etc.)

It will be observed that in each of the treaties made with each of the other civilized tribes, extracts from which

are above given, the purpose for which the land was being ceded to the United States is specifically stated. No such purpose is stated in the treaty made about the same time with the Choctaws and Chickasaws.

It is possible that the commission, when it came to negotiate with the Choctaws and Chickasaws, may have omitted from the treaty with those Indians a similar condition and reservation regarding the purposes for which the lands were to be used, because of the fact that the United States had secured by a prior treaty a lease, which amounted to a permanent lease, of the lands in question for Indian purposes, for which, together with other considerations, it had paid the sum of $800,000. Considering this fact, the commission negotiating the treaty may have considered the payment of the $300,000 additional, as provided for in the treaty of 1866, a sufficient compensation for an absolute cession of all right, title, and interest that the Choctaws and Chickasaws had in and to the said "leased district." This conclusion, however, can not be fairly reached, when the record of the negotiations is fully considered; for we have already seen that these Indians accepted the terms proposed by the commission, upon which the treaties would be negotiated; and these very terms indicate the purpose for which the ceded lands were to be used. And it shows quite clearly that the Indians understood that they were parting with whatever right, title, and interest remained to them in the "leased district" to the United States, to be used for the location and settlement of other Indians thereon.

The negotiations made about that time by the United States with Indian tribes show very conclusively that a policy had been carefully mapped out for the acquisition by the United States of the right to locate other Indians upon portions of the lands owned and occupied by the five civilized tribes in the Indian Territory.

I am inclined, therefore, to the opinion that the Choctaw and Chickasaw Indians have good ground for the claim that the United States took the land ceded by them upon the trust to settle other Indians and freedmen thereon, as the policy upon which the negotiations were made clearly indicated its desire and purpose to do.

While there are clearly no words of limitation in the treaty of 1866 as to the use to which the ceded lands should be put by the United States, the history of the negotiation preceding and resulting in that treaty and the subsequent treatment of the subject quite clearly indicate that the Choctaws and Chickasaws have good ground for claiming that they understood that the lands were to be used for the location of other Indians and freedmen thereon. Senate Rep. No. 552, 52d Cong., 1st Sess., pp. 12, 13.

No. 113. In an official communication to the President, dated January 26, 1885, the Secretary of the Interior said :

Objection will be made to the occupation of any part of the Indian Territory by other than Indians, on the ground that the Government set apart the Territory for the exclusive use of the Indians and covenanted that no others should reside therein. It is not denied that the treaties so provide. It is, however, within the power of the Government, with the consent of the Indians interested, to change this provision of the treaties so that these desirable unoccupied lands may be placed within the lawful reach of the settlers. Senate Rep. No. 552, 52d Cong., 1st Sess., p. 14.

No. 87.

52D CONGRESS, 1st Session. } SENATE. { REPORT No. 552.

IN THE SENATE OF THE UNITED STATES.

APRIL 13, 1892.—Ordered to be printed.

Mr. JONES, of Arkansas, from the Committee on Indian Affairs, submitted the following

REPORT:

[To accompany S. Mis. Doc. 126.]

The Committee on Indian Affairs, to whom was referred the message of the President relative to the act to pay the Choctaw and Chickasaw Indians for certain lands now occupied by the Cheyenne and Arapahoe Indians, and the memorial of the Chickasaws relating to said message, and the memorial of the Choctaws relating to the same subject, have considered the same, and report as follows:

By an act of the last Congress, approved by the President on March 3, 1891, an appropriation was made to pay the Choctaw and Chickasaw Indians the sum of $2,991,450 "for all the right, title, interest and claim which said nations of Indians may have in and to certain lands now occupied by the Cheyenne and Arapahoe Indians under Executive order." The money so appropriated has not been paid, and the President sent the message under consideration to Congress to explain why it had not been

done, and to make certain suggestions or recommendations in connection therewith.

The President's objections to this measure are in brief as follows, taken in the order in which they are stated in his message:

(1) The agreement on the part of the Choctaws to pay three of their citizens 25 per cent. of the amount appropriated to that nation, and of the Chickasaws to pay 10 per cent. of the amount appropriated to them, as a fee for prosecuting the claims.

(2) That there are charges that the act of the Choctaw council stipulating for the payment of this fee was procured by corrupt means.

(3) That the Choctaws have by law provided for the distribution of this fund per capita amongst Choctaws by blood, excluding white and colored citizens from participation therein.

(4) That he does not believe that these lands were "ceded in trust" by article 3 of the treaty of 1866, but seems to conclude that the Government has an absolute title to them.

Taking these objections up in the order of their importance, the question of title to these lands must first be considered.

The President, in attempting to maintain his position as to the title to the leased district, seems to assume that Spain owned all the country west of 100 degrees west longitude in 1820, and that the $800,000 paid the Choctaws in 1855 must have been mainly paid for the leased district, and not for the failure of title to more than 6,589,440 acres of land west of 100 degrees, and that the United States acquired in 1855 from the Choctaws and Chickasaws the same rights in the leased district that were acquired in 1866 from the Creeks and Seminoles to

their western country; and, further, that in 1866 the Government of the United States acquired an absolute title to the leased district. None of these positions are sustained by the history of those transactions.

By the treaty of June 22, 1855, the Choctaws relinquished to the United States all of their title to the lands west of the one hundredth meridian of west longitude, and the Choctaws and Chickasaws *leased* to the United States, for certain specified uses, their lands west of the ninety-eighth meridian. The aggregate consideration for the relinquishment and lease was fixed in the treaty at $800,000. There was no apportionment of this consideration as between the relinquishment of the lands west of the one hundredth meridian and the lease of the land west of the ninety-eighth meridian. The following are the provisions of the treaty relating to this subject:

"Art. 9. The Choctaw Indians do hereby absolutely and forever quitclaim and relinquish to the United States all their right, title, and interest in and to any and all lands west of the one hundredth degree of west longitude, and the Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein, excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas River and whose permanent locations are north of the Canadian River, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas, which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chicka-

saws, as may from time to time be prescribed by the President for their government: *Provided, however,* That the territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore." (11 Stat., 613.)

"Art. 10. In consideration of the foregoing relinquishment and lease, and as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct." (11 Stat., 613.)

Now, what was the interest in lands west of the one hundredth meridian which the Choctaws by this treaty relinquished to the United States?

The following are the stipulations of the treaty of October 18, 1820:

"Art. 1. To enable the President of the United States to carry into effect the above grand and humane objects, the Mingoes, head men and warriors of the Choctaw Nation, in full council assembled, in behalf of themselves and the said nation, do, by these presents, cede to the United States of America all the land lying and being within the boundaries following, to wit: Beginning on the Choctaw boundary, east of Pearl River, at a point due south of the White Oak Spring, on the old Indian path; thence north to said spring; thence northwardly to a black oak standing on the Natchez road, about forty poles eastwardly from Doake's fence, marked A. J. and blazed, with two large pines and a black oak standing near thereto and marked as pointers; thence a straight line to the head of Black Creek or Bouge Loosa; thence down Black Creek or Bouge Loosa to a small lake; thence a direct course so as to strike the Mississippi one mile below the mouth of the Arkansas River; thence down the Mississippi to

our boundary; thence around and along the same to the beginning." (7 Stat., 211.)

"Art. 2. For and in consideration of the foregoing cession on the part of the Choctaw Nation and in part satisfaction for the same, the commissioners of the United States in behalf of said States do hereby cede to said nation a tract of country west of the Mississippi River situate between the Arkansas and Red river, and bounded as follows: Beginning on the Arkansas River where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian Fork, and up the same to its source; thence due south to the Red River; thence down Red River three miles below the mouth of Little River, which empties itself into Red River on the north side; thence a direct line to the beginning." (7 Stat., 211.)

Here was an exchange of lands between the United States and the Choctaw Nation. The Choctaws ceded to the United States certain lands described by metes and bounds east of the Mississippi River, and the United States ceded to the Choctaws certain lands described by metes and bounds west of the Mississippi. The consideration for which the Choctaws ceded to the United States their lands east of the Mississippi *was not a part of the land* included within the metes and bounds of the western country ceded to them by the United States, *but was the whole of the land* included within those metes and bounds. If it had happened that a part of the land covered by this deed of the United States to the Choctaws was not in fact and in law owned by the United States on the 18th day of October, 1820, when the treaty was signed, the obligation of the United States would have been identical with the obligation incurred by an individual who, being a party to an exchange of farms, should prove not to be the owner of all the land covered by his deed.

In that event it would have become the duty of the United States to do one of four things: Either to acquire a complete title to all the land covered by their deed, and to convey the same to the Choctaws; or to restore to the Choctaws a part of their land east of the Mississippi River; or to rescind the treaty altogether and place the parties *in statu quo;* or, finally, to make just reimbursement in money for the land purchased and paid for by the Choctaws, but not delivered by the United States.

If it had been true that on the 18th day of October, 1820, the date of the exchange of lands between the United States and the Choctaw Nation, the United States had owned no lands between the Red and Canadian rivers west of the one hundredth degree of west longitude, then unless the United States had subsequently acquired and conveyed such lands, or restored to the Choctaws a part of their land east of the Mississippi River, or rescinded the treaty, the United States would have become bound to make just compensation to the Choctaws in money for the lands deeded but not delivered to them. So it would have come to pass that when the Choctaws, on the 22d day of June, 1855, relinquished their interest in the lands west of the one hundredth meridian, the interest so relinquished, as between the Choctaws and the United States, would have been precisely as valuable if the United States had not owned these lands on the 18th of October, 1820, as it would have been if the United States had owned the lands on that day. In one case it would have been the land itself the Choctaws relinquished on the 22d day of June, 1855; in the other case it would have been an indisputable claim for the just value of the lands which the Choctaws relinquished.

But while the reimbursement, to which the Choctaws would have been entitled for the relinquishment of their

interest in these lands west of the one hundredth meridian of longitude in 1855, would have been the same whether the lands did or did not belong to the United States on the 18th day of October, 1820, when the exchange was made, the fact is that on that day these lands did belong to the United States, and while this question in this view of the case may not be material to the issue, your committee think that for a full and complete understanding of the matter it is best to show this fact.

On the 18th day of October, 1820, when the commissioners of the United States and the commissioners of the Choctaw Nation signed the treaty by which the Choctaw Nation ceded to the United States their lands east of the Mississippi River, in exchange for their new country west of the Mississippi, the United States owned all the land which is included between the one hundredth and the one hundred and third meridians of west longitude and the Red and Canadian rivers. This tract of land became a part of the province of Louisiana, upon the original acquisition of that province by France by virtue of the discovery of La Salle in 1683 and the settlement of La Salle on the bay now known as Matagorda Bay in 1685.

It continued to be a part of Louisiana for seventy-seven years from the acquisition of that province by France in 1683 and 1685 until France ceded Louisiana to Spain on the 3d of November, 1762. It was a part of the province of Louisiana that France then ceded to Spain. It continued to be a part of the province of Louisiana during the period of thirty-eight years from the cession by France to Spain in 1762 to the retrocession by Spain to France in 1800 by the treaty of St. Ildefonso. It was a part of the province of Louisiana retroceded to France by that treaty.

It remained a part of Louisiana from the retrocession

by Spain to France in 1800 to the cession by France to the United States in 1803.

And, finally, it continued to be a part of Louisiana from 1803 until the treaty of October 18, 1820, between the United States and the Choctaws, and was ceded by that treaty to the Choctaw Nation. The facts stated above are established by the State papers in the archives of the Government of the United States, by sixteen different maps of Louisiana published in London, Paris, Leyden, St. Petersburg, and Amsterdam, between the year 1702 and the year 1774, and by a map published in Paris in 1820, by M. Barbè-Marbois, who was the French negotiator of the treaty by which Louisiana was ceded to the United States in 1803.

Copies of these State papers and maps are embraced in the appendix to this report.

Now, it happened that there was an inconsistency between the *natural objects* and one of the *courses* specified in the conveyance made by the United States to the Choctaws in the treaty of October 18, 1820. It is a fact that a line drawn *due south* from the *source of the Canadian* will not touch *Red River*, because the source of the Red River is farther eastward than the source of the Canadian.

But Mr. Justice Story, delivering the opinion of the Supreme Court of the United States in Preston's Heirs *vs.* Bowman (6 Wheat., 580) laid it down as "a universal rule that course and distance yield to natural and ascertained objects." And in Newson *vs.* Prior (7 Wheat., 7) Chief-Justice Marshall said:

"The courts of Tennessee, and all other courts by whom cases of this description have been decided, have adopted the same principle and adhered to it. It is that the most material and most certain calls shall control those which

are less material and less certain. A call for a natural object, as a river, or a known stream, a spring, or even a marked tree, shall control both course and distance."

It is unnecessary to cite the numerous, not to say innumerable, authorities by which this principle has been recognized and approved.

Applying these indisputable rules of law to the case under consideration, we find that two of the calls of this conveyance to the Choctaw Nation are for *natural objects;* namely, first, the *source* of the Canadian River; and second, the *Red River;* that a third call is for a *course* connecting the Red River and the source of the Canadian; that this course, being due south from the source of the Canadian, is inconsistent with the other two calls, because the source of the Canadian is further west than that of the Red River, and that this third call is therefore controlled by the other two calls of the description. The result is that the Red River and the source of the Canadian are to be connected by a straight line from the source of the Canadian to the nearest point of the Red River, which nearest point happens to be the source of the Red River.

But on the map accompanying the report of the Commissioner of Indian Affairs for 1888 the source of the Canadian River is located in 104° 30′ west longitude, and 37° north latitude, and the source of the Red River in 103° 30′ west longitude, and 34° 45′ north latitude. A line drawn from the source of the Canadian to the source of the Red River lies wholly west of 103° 30′, and may, therefore, lie within territory which belonged to Spain in 1820. But it is certain that the cession to the Choctaws carried all the land between the one hundredth and one hundred and third meridians and the Red and Canadian rivers. The map No. 18, hereto appended, accurately traced from the map published in the report of the Com-

missioner of Indian Affairs for 1888, shows the dimensions of the lands of the Choctaws west of the one hundredth meridian. It contained 10,296 square miles and 6,589,440 acres.

Your Committee therefore believe that when the Choctaws relinquished their interest in the lands between the Red and the Canadian rivers west of the one hundredth meridian of west longitude, on the 22d day of June, 1855, they were entitled to receive in compensation for that relinquishment the just value of those lands. What, then, was the just value of those lands in 1855? The territory of the Choctaws west of the one hundredth meridian of west longitude contained 286 full townships, excluding fractional townships, amounting to 10,296 square miles or 6,589,440 acres of land. At the price of 12½ cents per acre this land amounted in value to $823,680. But in the treaty of June 22, 1855, the sum of $800,000 was constituted the entire pecuniary consideration, not only for the relinquishment by the Choctaws of their interests west of the one hundredth meridian, but also for the lease by the Choctaws and Chickasaws to the United States of the land between the ninety-eighth and the one hundredth meridians. The sum of $800,000 was not more than sufficient to compensate the Choctaws for the relinquishment of the land west of the one hundredth meridian. Nothing remained, then, to apply on the lease of the land between the ninety-eighth and one hundredth meridians, which amounted to 7,713,239 acres. The rent of the 7,713,239 acres of land between these meridians was, therefore, altogether nominal—it did not amount to $1. For less than $1, then, the United States have held 7,713,239 acres of land from June, 1855, down to March, 1892, a period of more than thirty-six years.

Now, what considerations could possibly have recon-

ciled the Choctaws and Chickasaws to a lease covering 7,713,239 acres of land for a period of thirty-six years at an aggregate rental of less than $1? There were two considerations which reconciled the Choctaws and Chickasaws to this lease. These considerations were the uses to which the lands were devoted. In the first place, by the express terms of the lease, the lands were to be used for a permanent settlement of the Wichitas and other bands or tribes of Indians, entirely satisfactory to the Choctaws and to none other; in the second place, they were to remain open to settlement by the Choctaws and Chickasaws themselves, as before the lease.

But on the 27th day of September, 1830, ten years after the Choctaws had purchased and paid for their western country, including this land west of the one hundredth meridian, the United States caused the following article to be inserted in a new treaty between the United States and the Choctaw Nation:

"Art. 2. The United States, under a grant specially to be made by the President of the United States, shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River in fee-simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it, beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas River; running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red River and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning." (7 Stat., 331.)

In this article the western line of the Choctaws is declared to extend from the "source of the Canadian fork, *if in the limits of the United States*," due south to Red River. But there was no such "if" in the deed by which

the Choctaws acquired this land, on the 18th of October 1820, and under which they had already held it, or claimed to hold it, for ten years.

What is the explanation of this new demarcation of the western boundary of the Choctaw country? And what is its bearing upon the right of the Choctaws for compensation for the relinquishment subsequently made by them in the treaty of June 22, 1855? The explanation of this change of boundary is this: After the United States had sold this land to the Choctaws, and received payment in full therefor, the United States sold the same land, out from under the Choctaws, to the King of Spain. On the 19th day of February, 1821, four months after the purchase of this land by the Choctaws, the Senate of the United States ratified a treaty whereby the United States sold the western part of the province of Louisiana, including the land of the Choctaws west of the one hundredth meridian, to the Spanish King in part payment for the much-coveted province of Florida. This treaty was signed on the 22d of February, 1819; but it had been rejected by the King of Spain. Pending the negotiation of the treaty by which the United States sold this land to the Choctaws, the United States never disclosed to the Choctaws their purpose to sell the land to a foreign power.

The Choctaws were not apprised that a consummation of such a sale to the King of Spain awaited a possible ratification by that King of a treaty which had stood rejected for nearly two years, and its subsequent ratification by the Senate of the United States. And yet this Spanish treaty divested the Choctaws of their legal title to the land west of the one hundredth meridian, which the United States had previously deeded them, and for which they had fully paid. Indeed, when the United States sold this land to the Choctaws, without notifying them of the nego

tiations with Spain, it was far from being certain or even probable in the minds of the legislative and executive officers of the Government of the United States that the exchange of western Louisiana for Florida would be consummated; for not only had the King of Spain rejected the treaty, but a vigorous opposition to the exchange of western Louisiana for Florida had sprung up in the Congress of the United States, based on the ground that the price to be paid for Florida was extravagantly large, and also on the ground that the sale of the territory of the United States to a foreign government by the President and the Senate, in the exercise of the treaty-making power, without the coöperation of the House of Representatives was unconstitutional and void. On the 28th day of March, 1820, Henry Clay, of Kentucky, introduced the following resolutions in the House of Representatives of the United States:

"(1.) *Resolved*, That the Constitution of the United States vests in Congress the power of disposing of the territory belonging to them, and that no treaty purporting to alienate any portion thereof is valid without the concurrence of Congress.

"(2.) *Resolved*, That the equivalent proposed to be given by Spain to the United States, in the treaty concluded between them on the 22d day of February, 1819, for that part of Louisiana lying west of the Sabine, was inadequate, and that it would be inexpedient to make a transfer thereof to any foreign power, or to renew the aforesaid treaty."

On the 3d of April, 1820, Mr. Clay delivered a speech in the House of Representatives in support of these resolutions, in which he is reported as follows:

"The first resolution which he had presented asserted that the Constitution vests in the Congress of the United

States the power to dispose of the territory belonging to them, and that no treaty purporting to alienate any portion thereof is valid without the concurrence of Congress. The proposition which it asserts was, he thought, sufficiently maintained by barely reading the clause in the Constitution on which it rests:

"'The Congress shall have power to dispose of, etc., the territory or other property belonging to the United States.' * * *

"But in the Florida treaty it was not pretended that the object was simply a declaration of where the western limit of Louisiana was. It was, on the contrary, the case of an *avowed cession of territory from the United States to Spain.*" * * *

On the second resolution he said:

"It results, then, that *we have given for Florida, charged and encumbered as it is, first, unencumbered Texas;* second, $5,000,000; third, a surrender of all our claims upon Spain not included in that five millions; and, fourth, if the interpretation of the treaty which he had stated were well founded, about 1,000,000 acres of the best unseated land in the State of Louisiana, worth, perhaps, $10,000,000. The first proposition contained in the second resolution was thus, Mr. C. thought, fully sustained. The next was, it was inexpedient to cede Texas to any foreign power. Mr. C. said he was opposed to the transfer of any part of the territory of the United States to any foreign power. They constituted, in his opinion, a sacred inheritance of posterity which we ought to preserve unimpaired. He wished it was, if it were not, a fundamental and available law of the land that they should be inalienable to any foreign power. * * *

"The last proposition which the second resolution affirms is that it is inexpedient to renew the treaty. If

Spain had promptly ratified it, bad as it is, he would have acquiesced in it. After the protracted negotiation which it terminated, after the irritating and exasperating correspondence which preceded it, he would have taken the treaty as a man who has passed a long and restless night, turning and tossing in his bed, snatches at day an hour's disturbed repose. But she would not ratify it; she would not consent to be bound by it, and she has liberated us from it. * * * Let us put aside the treaty; tell her to grant us our rights to their uttermost extent. And if she still palters, let us assert those rights by whatever measures it is for the interests of our country to adopt." (Ann. Cong., Sixteenth Congress, first session, Vol. 2, pp. 1691, 1724, 1725, 1726, 1729, 1730, and 1731.)

The final ratification of the Spanish treaty extinguished the title of the Choctaws to their land west of the one hundredth meridian, but it did not extinguish their right of reclamation against the United States for this land, which had been sold to the Choctaws by the United States and paid for by the Choctaws, and then sold without the knowledge or consent of the Choctaws to the King of Spain. When the Choctaw treaty of 1830 was signed the United States, being apprehensive that a part of the land sold to the Choctaws by metes and bounds in 1820 would prove to be within the boundaries of the land subsequently sold to Spain, in part payment for Florida, insisted upon such a modification of the boundaries of the Choctaw Nation as should, in effect, make its western line coincident with the eastern line of the land sold to Spain. By the Spanish treaty the eastern boundary of that part of Louisiana which was ceded to Spain in exchange for Florida was fixed as follows:

"Art. 3. The boundary line between the two countries west of the Mississippi shall begin on the Gulf of Mexico,

at the mouth of the river Sabine, in the sea, continuing north along the western bank of that river to the thirty-second degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo of Natchitoches or Red River; then following the course of the Rio Roxo westward to the degree of longitude one hundred west from London and twenty-three from Washington; then crossing the said Red River and running thence by a line due north to the river Arkansas; thence following the course of the southern bank of the Arkansas to its source in latitude forty-two north, and thence by that parallel of latitude to the south sea." (8 Stat., 254.)

The stipulation in the Choctaw treaty of 1830 as to boundaries was a mere recognition of what had been for nine years an accomplished fact. It was only a recognition of the fact that so much of the land sold to the Choctaws on the 18th of October, 1820, as lay west of the one hundredth meridian had been sold to Spain on the 19th of February, 1821, and that the title of the Choctaws thereto had been extinguished by such sale. It was in no sense a stipulation, either express or implied, on the part of the Choctaws to waive their right for reimbursement for the lands which they had bought and paid for and then involuntarily lost. If this land had not been the property of the United States when the United States conveyed it to the Choctaws and received payment therefor from the Choctaws, the right of the Choctaws to reimbursement would have been incontestable. *A fortiori* was the right to reimbursement incontestable when the United States, having sold the land to the Choctaws and received full payment for it, subsequently sold it, without their knowledge or consent, to the King of Spain.

It was with good reason, then, that the United States and the Choctaws stipulated in the treaty of June 22, 1855,

for the relinquishment of the interest of the Choctaws in the land west of the one hundredth meridian. This stipulation was not merely a nominal stipulation for the relinquishment of an intangible, nebulous, imaginary claim, but was a *bona fide* stipulation, entered into for the relinquishment of a substantial right, recognized as such by both parties to the treaty.

The books, documents, and maps showing the interest of the Choctaws and Chickasaws in the lands west of the ninety-eighth meridian, known as the "leased district," have always been readily accessible to the Secretary of the Interior, and yet when, in pursuance of the authority conferred by section 14 of the Indian appropriation act, approved March 2, 1889, a commission was appointed "to negotiate with the Cherokee Indians, and with all other Indians owning or claiming lands lying west of the ninety-sixth degree of longitude, in the Indian Territory, for the cession to the United States of all their title, claim, or interest of every kind or character in and to said lands," the Secretary, in his "compilation concerning the legal status of the Indians and lands in the Indian Territory," issued to the commissioners, informed them that the interest of the Choctaws and Chickasaws in Greer County, which was a part of the "leased district," had been extinguished by the treaty of 1866. This was tantamount to an assertion that the interest of the Choctaws and Chickasaws in the entire "leased district" had been extinguished by the treaty of 1866, and it was the only allusion to the interest of the Choctaws and Chickasaws in the leased district made in that compilation. The Secretary's statement is printed on page 30 of Senate Ex. Doc. No. 78, Fifty-first Congress, first session, as follows:

"*Greer County.*—While that part of the Choctaw and Chickasaw country lying immediately west of the Kiowa

and Comanche and Apache reservations, and between the Red River and the North Fork thereof and the State of Texas (marked No. 31 on the map), is not subject to negotiation, the Indian title thereto having been extinguished by the treaty of 1866 with those Indians, I deem it proper to give its status, as understood by this Department."

On the 19th of December, 1889, the Senate adopted the following resolution:

"*Resolved*, That the Secretary of the Interior be directed to send to the Senate the compilation recently made in the Indian Bureau concerning the legal status of the Indians and lands located in the Indian Territory, and that he also, if not incompatible with the public interest, send to the Senate instructions issued to the Commission recently appointed pursuant to act of Congress to negotiate for the cession to the Government of lands west of the ninety-sixth degree in the Indian Territory."

The Secretary, however, not only declined to send the "instructions," but also declined to send the "compilation." His answer to the resolution of the Senate is printed in Senate Ex. Doc. No. 21, first session, Fifty-first Congress, as follows:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *December* 21, 1889.

SIR: I have the honor to acknowledge the receipt of the following resolution of the Senate, dated 19th instant:

"*Resolved*, That the Secretary of the Interior be directed to send to the Senate the compilation recently made in the Indian Bureau concerning the legal status of the Indians and lands located in the Indian Territory, and that he also, if not incompatible with the public interest, send to the Senate instructions issued to the commission recently appointed pursuant to act of Congress to nego-

tiate for the cession to the Government of lands west of the ninety-sixth degree in the Indian Territory."

In response thereto I have the honor to state that no compilation has been made by the Indian Bureau concerning the legal status of the Indians and lands located in the Indian Territory other than that embodied in the instructions to the Cherokee Commission.

In view of the pending negotiations with these Indians, I deem it incompatible with the public interest that these instructions at this time be made public.

With the final report of the commission a copy of the instructions herewith requested will be furnished.

I have the honor to be, very respectfully,

JOHN W. NOBLE,
Secretary.

The PRESIDENT OF THE SENATE.

Thereupon the Senate, by a resolution adopted March 10, 1890, peremptorily directed the Secretary to send the compilation to the Senate, as follows:

"*Resolved*, That the Secretary of the Interior be directed to send to the Senate the compilation recently made in the Indian Bureau, concerning the legal status of the Indians and lands within the Indian Territory."

The Secretary replied as follows:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *March* 12, 1890.

SIR: I have the honor to acknowledge the receipt of Senate resolution in the following words:

"*Resolved*, That the Secretary of the Interior be directed to send to the Senate the compilation recently made in the Indian Bureau, concerning the legal status of the Indians and lands within the Indian Territory."

In response thereto I transmit herewith the compilation called for, from which has been eliminated the instructions given the Cherokee Commission.

I have the honor to be, very respectfully,

JOHN W. NOBLE,
Secretary.

The PRESIDENT OF THE SENATE.

The Secretary had access to the books, documents, and maps, which showed the interest of the Cheyennes and Arapahoes in the Cimarron tract of more than 5,000,000 acres, as well as in the tract of 2,489,160 acres within the "leased district," when he issued his "instructions" to the commissioners as above stated. Indeed, in this "compilation," on pages 9 and 10 of Senate Ex. Doc. No. 78, first session, Fifty-first Congress, the Secretary, referring to the Cimarron tract, says:

"These lands, it must be conceded, were secured to these tribes by solemn treaty stipulation, and they have made no treaty ceding them, nor agreement of relinquishment that is of any binding force or effect. They have committed no act of forfeiture. Their title stands to-day as it did at the date of the ratification of the treaty of 1867. As between the United States and the Cheyennes and Arapahoes, the title to the lands is in these Indians, and they have a perfect and indisputable right to remove to that reservation and enjoy all the privileges guaranteed to them by the treaty."

The commissioners refused to negotiate with the Choctaws and Chickasaws for their interest in the "leased district;" but they proceeded to negotiate with the Cheyennes and Arapahoes for a cession of their interest in that part of the "leased district" on which they were located by the executive order dated August 10, 1869,

although there can be no pretense that the President had any authority to vest any sort of title to these lands in these Indians.

It seems to be a necessary inference from the facts just stated that the instructions which the Secretary declined to furnish to the Senate required the commissioners to negotiate with the Cheyennes and Arapahoes for their interest in the "leased district," which was, in fact, a mere right of occupancy and in no sense a title to the land, but did not permit them to negotiate with the Choctaws and Chickasaws for their interests therein, thus actually suspending the law, notwithstanding the fact that Congress had explicitly directed the commission, to use the words of the statute, "to negotiate with the Cherokee Indians and with all other Indians owning or claiming lands lying west of the ninety sixth degree of longitude in the Indian Territory, for the cession to the United States of all their title, claim, or interest of every kind and character in and to said lands," which clearly embraced in its terms the claims of the Choctaws and Chickasaws to the "leased district."

The commissioners having, in pursuance, as your committee infer, of the instructions of the Secretary of the Interior, refused to negotiate with the Choctaws and Chickasaws for the relinquishment of their interest in the "leased district," the governor of the Chickasaw Nation it appears sent B. C. Burney and Overton Love, citizens of that nation, to Washington to apply to Congress for protection against the threatened invasion of their rights. Your committee are informed that before making their formal application to Congress the Chickasaw delegates, Messrs. Burney and Love, had an interview with a well-known financier and capitalist, now a distinguished member of the Executive Department of the Government, in

which he said to them that, if they could obtain from Congress authority to sell the lands embraced within the "leased district" at private sale, a syndicate could be organized to purchase them at the price of $5 per acre, at which rate the lands, being in area 7,713,239 acres, would amount to $38,566,190, and at the same time he expressed the opinion that the proposed syndicate would be able to sell the lands for $10 per acre, at which rate the lands would have yielded the syndicate a profit of more than $35,000,000.

If the law as it stands had been executed and the amount appropriated paid to the Choctaws and Chickasaws, and the Cheyenne and Arapahoe agreement had also been ratified and afterwards executed, even though it might be said that the Government had had to "pay twice for these lands," yet it would have bought land worth $5 per acre for $1.31 per acre, and which it proposed to sell to actual settlers at $1.50, which upon a sale of the entire tract would yield, leaving out of the account 96,000 acres given in severalty to the Cheyennes and Arapahoes, a net profit to the Government of $454,700, and to the settlers lands worth $11,965,800 for $3,589,740, or a net profit of $8,376,060.

In the message of the President, transmitted to Congress February 17, 1892, he says:

"After a somewhat careful examination of the question I do not believe that the lands for which this money is to be paid were, to quote the language of section 15 of the Indian appropriation bill already set out, 'ceded in trust by article 3 of treaty between the United States and said Choctaw and Chickasaw nations of Indians, which was concluded April 28, 1866.'"

The President is of the opinion that the lands in question were not ceded in trust to the United States by

this treaty. He thinks that an absolute, unqualified title was conveyed by the treaty, and as he elsewhere says, that the United States paid the Choctaws and Chickasaws therefor the sum of $300,000. On the contrary, your committee believe that the estate conveyed was a trust estate only; that whereas the treaty of 1855 empowered the United States to locate upon these lands only those Indians whose ranges were included within certain specified limits, this treaty of 1866 authorized the United States—

(1) To locate upon these lands Indians like the Cheyennes and Arapahoes, whose ranges were not within the limits designated in the treaty of 1855, and whom, prior to the treaty of 1866, the United States had no right to locate upon the lands;

(2) To locate upon the lands Choctaw and Chickasaw freedmen;

(3) Deprived the Choctaws and Chickasaws themselves of the right to settle thereon.

The treaty disposed of this sum of $300,000 as follows: It was to remain in the Treasury of the United States. If the Choctaws and Chickasaws should decide not to confer citizenship upon their freedmen, and the United States should remove the freedmen with their consent from the Choctaw and Chickasaw nations, then the sum of $300,000 was to be held in trust for the freedmen. If the Choctaws and Chickasaws should deside not to admit their freedmen to citizenship, and the freedmen should decline to be removed from the Choctaw and Chickasaw nations, then this sum of $300,000 was to remain the property of the United States. But if within two years the freedmen should be invested with citizenship, and should refuse to leave the Choctaw and Chickasaw nations, then, and only then, was the money to be paid to the Choctaws and Chickasaws.

The purpose of this provision relating to the $300,000 was not to pay for the land. Its object was to cover the cost of the removal of the freedmen if the Choctaws and Chickasaws should not admit them to citizenship, or to compensate the Choctaws and Chickasaws in some measure for the benefits conferred upon the freedmen by conferring citizenship upon them, in case this should be done. These benefits were material and substantial; in addition to all the civil and political rights enjoyed by the Indians themselves, they acquired property rights such as were conferred upon no freedmen outside of the Indian Territory. They have the free use of lands just as the Indians have, and the benefit of excellent schools, for the support of which they have never contributed in any way a single cent. To have these rights conferred upon 3,000 freedmen the Government agreed to pay $300,000. The Choctaws agreed to it, the Chickasaws did not. This sum was fixed at $300,000 because the number of freedmen were estimated at 3,000, and it was agreed that each freedman, in case of removal, should receive for the expenses incident to emigration the sum of $100.

The Choctaws admitted their freedmen to citizenship and received their share of the sum of $300,000, less $7,200 paid to freedmen who promised to emigrate from the Choctaw Nation.

The Choctaws and Chickasaws claim that their position was like that of the Creeks and Seminoles, who have already been paid under the acts of March 1 and 2, 1889, for their interest in the lands ceded by the treaties of 1866.

The language of the Creek treaty is:

"In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as

the United States may choose to settle thereon, the west half of their entire domain," etc.

In the Seminole treaty the language is:

"In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Seminoles cede and convey to the United States their entire domain, being," etc.

In the Choctaw and Chickasaw treaty the words are:

"The Choctaws and Chickasaws, in consideration of the sum of $300,000, hereby cede to the United States the territory west of the ninety-eighth degree west longitude: Provided," etc.

The difference between these treaties is that the Choctaw and Chickasaw treaty does not contain the words "in compliance with the desire of the United States to locate other Indians and freedmen thereon" preceding the words of conveyance; but this committee believe that these words are distinctly implied and just as binding upon the United States as if they had been so used, for the reason that when the commissioners of the United States met these Indians to negotiate this treaty they informed the Indians that they were authorized to treat only upon condition that they (the Indians) would consent that the Indian country should be set apart for Indian occupation. This demand of the Government was acceded to by the Indians, and upon this condition the treaty was made. The agents of the United States so reported to their Government at the time, and it has been so understood since.

The following is taken from a report made to Congress in this case by the Indian Office September 13, 1890:

"The records of this office show that in 1865 a commission was appointed to negotiate with the Indians of the then Southern Superintendency, among them the

Choctaws, Chickasaws, Creeks, Seminoles, and Cheroke
* * * A council was held between this commissi
and representatives of the Southern Indians at Fort Smi
Ark., in September, beginning on the 8th and ending
the 21st day of that month. On the 9th of Septemb
1865, the president of the commission, Hon. D. N. Cool
who was also at that time Commissioner of Indian Affai
addressed the council, * * * and declared * *
that, as the representatives of the President of the Unit
States, the commission, for which he spoke, was empower
to enter into new treaties with the proper delegates of t
tribes located within the Indian Territory and others abo
named living west and north of Indian Territory; th
such treaties must contain substantially the followi
stipulations, viz:

* * * * *

"'Fifth. A part of the Indian country to be set apart
be purchased for the use of such Indians from Kansas a
elsewhere as the Government may desire to coloni
therein.

"'Sixth. That the policy of the government to unite
the tribes of this region into one consolidated governme
should be accepted.

"'Seventh. No *white person*, except officers, agents, a
employés of the Government, or of any internal improv
ment company authorized by the Government, will
permitted to reside in the Territory, unless formally i
corporated with some tribe according to the usage of t
band.'

"On September 11, 1865, in a letter addressed to t
commissioners of the United States, the Choctaw delegat
said: .'In answer, therefore, to your propositions to t
several tribes of Indians, we say that the first, secon
third, fourth, fifth, and sixth articles meet our approva

and submitted in lieu of the seventh proposition a proposition which provided that "no white person, except officers, agents, employés of the Government, or of any internal improvement company authorized by the Government of the United States; also, no person of African descent, except our former slaves, or free persons of color who are now or have been residents of the Territory, will be permitted to reside in the Territory unless formally incorporated with some tribe according to the usages of the band.'

"Later, in the progress of the council, about the 18th of September, the commissioners of the southern factions of the Choctaw and Chickasaw tribes accepted the propositions suggested by the commissioners, and before the final adjournment of that council, the 21st of September, all of the delegates of the tribes represented signed a treaty of peace between themselves and the United States. (These proceedings will be found in the Annual Report of the Indian Bureau, 1885, p. 105, etc.)

"It will be observed that in each of the treaties made with each of the other civilized tribes, extracts from which are above given, the purpose for which the land was being ceded to the United States is specifically stated. No such purpose is stated in the treaty made about the same time with the Choctaws and Chickasaws. It is possible that the commission, when it came to negotiate with the Choctaws and Chickasaws, may have omitted from the treaty with those Indians a similar condition and reservation regarding the purposes for which the lands were to be used, because of the fact that the United States had secured by a prior treaty a lease, which amounted to a permanent lease, of the lands in question for Indian purposes, for which, together with other considerations. it had paid the sum of $800,000. Considering this fact, the commission

negotiating the treaty may have considered the payment of the $300,000 additional, as provided for in the treaty of 1866, a sufficient compensation for an absolute cession of all right, title and interest that the Choctaws and Chickasaws had in and to the said 'leased district.' This conclusion, however, can not be fairly reached, when the record of the negotiations is fully considered; for we have already seen that these Indians accepted the terms proposed by the commission, upon which the treaties would be negotiated; and these very terms indicate the purpose for which the ceded lands were to be used. And it shows quite clearly that the Indians understood that they were parting with whatever right, title, and interest remained to them in the 'leased district' to the United States, to be used for the location and settlement of other Indians thereon.

"The negotiations made about that time by the United States with Indian tribes show very conclusively that a policy had been carefully mapped out for the acquisition by the United States of the right to locate other Indians upon portions of the lands owned and occupied by the five civilized tribes in the Indian Territory.

"I am inclined, therefore, to the opinion that the Choctaw and Chickasaw Indians have good ground for the claim that the United States took the land ceded by them upon the trust to settle other Indians and freedmen thereon, as the policy upon which the negotiations were made clearly indicated its desire and purpose to do.

"While there are clearly no words of limitation in the treaty of 1866 as to the use to which the ceded lands should be put by the United States, the history of the negotiation preceding and resulting in that treaty and the subsequent treatment of the subject quite clearly indicate that the Choctaws and Chickasaws have good ground for claiming that they understood that the lands were to be

used for the location of other Indians and freedmen thereon."

Hon. D. N. Cooley was Commissioner of Indian Affairs at the time this treaty was negotiated. He was president of the treaty commissioners, was himself personally present and conducted the negotiations, and in his formal report as Commissioner of Indian Affairs to the Secretary of the Interior, in 1865, he uses this language:

"With the Choctaws and Chickasaws a treaty was agreed upon the basis of the seven propositions heretofore stated, and in addition to which those tribes agreed to a thorough and friendly union among their own people, and forgetfulness of past differences; to the opening of the leased lands to the settlement of any tribes whom the Government of the United States may desire to place thereon," etc.

The Secretary of the Interior, in an official communication to the Secretary of War, dated May 1, 1879, said:

"The lands ceded by the Choctaws and Chickasaws were, by article 9 of the treaty of June 22, 1855, leased to the United States for the permanent settlement of the Wichitas, and such other tribes or bands of Indians as the Government may desire to locate therein. The treaty of 1866 substituted a direct purchase for the lease, but did not extinguish or alter the trust."

On the 17th of February, 1882, the Secretary of the Interior communicated to the Senate of the United States a decision of the Commissioner of the General Land Office, containing the following statement:

"The Choctaw and Chickasaw cession of April 28, 1866 (14 Stat., 769), was, by the tenth section thereof, made subject to the conditions of the compact of June 22, 1855 (11 Stat., 613), by the ninth article of which it was stipulated that the land should be appropriated for the permanent settlement of such tribes or bands of Indians as the

United States might desire to locate thereon. The lands embraced in the Choctaw and Chickasaw cession were also included in a definite district, established by the stipulations of the treaty of 1855, pursuant to the act of Congress of May 28, 1830, the United States reengaging, by the seventh article of the said treaty, to remove and keep out from that district all intruders.

"In pursuance of the stipulations of the foregoing compacts, and in the exercise of the trusts assumed by the United States, under the several treaties, and in accordance with specific provisions of law and the lawful orders of the President, all the lands in the Indian Territory to which the United States has title have been permanently appropriated or definitely reserved for the uses and purposes named. The title of the United States to lands in the Indian Territory is, as heretofore shown, subject to specific trusts, and it is not within the lawful power of either the legislative or executive departments of the Government to annihilate such trusts, or to avoid the obligations arising thereunder. Such trusts are for the benefit of Indian tribes and Indian freedmen."

In response to a Senate resolution of January 23, 1884, the Secretary of the Interior transmitted to the President of the Senate the following communication:

"SIR: I have the honor to acknowledge receipt of Senate resolution of January 23 last, directing the Secretary of the Interior—

"'To advise the Senate of the present status of lands in the Indian Territory, other than those claimed and occupied by the five civilized tribes, the extent of each tract separately, the necessity for or obligation to keep said lands in their present condition of occupancy or otherwise, and as to whether any portion of said lands, and if so, what portion, are subject to entry under the land laws

of the United States, and as to what portion, if any, could be made so subject to entry by the action of the Executive.'

"These lands were acquired by treaties with the various Indian nations or tribes in that Territory in 1866, to be held for Indian purposes and to some extent for the settlement of the former slaves of some of said nations, or portions thereof.

"Such are the purposes for which said lands are now being used or held, according to the common understanding of the objects of treaties by which they were acquired; and from these arise the necessity for or obligation to keep said lands in their present condition of occupancy or otherwise."

In an official communication to the President, dated January 26, 1885, the Secretary of the Interior said:

"Objection will be made to the occupation of any part of the Indian Territory by other than Indians, on the ground that the Government set apart the Territory for the exclusive use of the Indians and covenanted that no others should reside therein. It is not denied that the treaties so provide. It is, however, within the power of the Government, with the consent of the Indians interested, to change this provision of the treaties so that these desirable unoccupied lands may be placed within the lawful reach of the settlers."

In the case of the United States *v.* Paine (2 McCrary, 290), the court said:

"Now we must look to the acts of the Government, since the adoption of this treaty, in order to understand its purpose. We find that in the year 1866 it entered upon the policy of settling tribes of Indians, other than the five civilized tribes, in the Indian country. Since that time by treaties, laws, and executive orders of the President it has settled upon reservations in the Indian country

the Cheyennes, the Arapahoes, the Kiowas, the Comanches, the Wichitas, the Pawnees, the Sacs and Foxes, the Nez Perces, the Poncas, the Modocs, the Kansas, the Osages, the Pottawatomies, the Absentee Shawnees, as well as some other small tribes. This explains why the treaty-making power thought, on March 21, 1866, that there was an urgent necessity of the Government for more lands in the Indian Territory. This shows that the Government not only had a desire to locate other Indians in the Indian Territory, but to a great extent it has consummated that desire."

But the President, referring to the leased district, says:

"As to these lands, the Government had already, under the treaty of 1855, secured the right to use them perpetually for the settlement of friendly Indians. This was not true as to the other tribes referred to."

This statement, if material to the question now at issue, means, first, that by the treaty of 1855 the Government acquired the right to locate upon these lands *any* Indian tribes which it might be convenient for the Government to locate thereon, without restriction or limitation; and, secondly, that the Government, by the treaty of 1855, acquired the right to allot these lands in severalty to such Indians. On both of these points, your committee think the President is mistaken.

The treaty of 1855 secured to the Government the right to locate on the lands in controversy those Indian tribes whose homes and ranges were within certain designated limits, and no others. The following is the text of the treaty:

"The Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude, for the permanent settlement of such other tribes or bands of

Indians as the Government may desire to locate therein; excluding, however, all the Indians of New Mexico, and also all those whose usual ranges at present are north of the Arkansas River, and whose permanent locations are north of the Canadian River, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas."

Moreover, the treaty of 1855 did not grant, or purport to grant, to the United States any right to allot these lands in severalty to individual owners, or to transfer the ownership of the lands. As to these lands the treaty of 1855 was not a deed in fee simple, but only a lease from the Choctaws and Chickasaws to the United States. It empowered the United States, not to convey, but only to sublet the lands. The words of the treaty are:

"The Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude."

Until the Choctaws and Chickasaws assented to the provisions of the act of March 3, 1891, they were never willing nor did they ever consent that these lands should be opened to settlement by whites, or allotted, or conveyed in severalty, to whites, blacks, or Indians.

The President expresses the opinion that the conditions attached to the cessions in the Creek and Seminole treaties of 1866 were the same as those which were attached to the lease in the Choctaw and Chickasaw treaty of 1855, and that, therefore, the claim of the Choctaws and Chickasaws that the cession in their latter treaty of 1866 was encumbered by a condition, or trust, is not supported by any analogies of the Creek and Seminole cases. This is a mistake. The trusts created in the Creek and Seminole treaties of 1866 were trusts (1) for the location of friendly Indians, in general, without restriction, and (2) for the

location of freedmen. Neither of these two trusts was created by the Choctaw and Chickasaw treaty of 1855. Neither of them existed, in the case of the leased district, until created by the Choctaw and Chickasaw treaty of 1866. The trust created by the Choctaw and Chickasaw treaty of 1855 was a trust not to locate Indians in general, but to locate certain Indians whose ranges were included within the boundaries designated in the treaty. This treaty of 1855 contained no trust whatever for the location of freedmen. That trust was first created, for the leased district, by the Choctaw and Chickasaw treaty of 1866.

It is true that these two trusts of the Choctaw and Chickasaw treaty of 1866 are not created by express words qualifying the grant. But this is also true of the Creek and Seminole treaties. In those treaties the trusts are not expressed, but are implied in words used in recitals only. They are not implied in either of those treaties, in words used in the body of the grant. The recital in each case is in the following words: "In compliance with the desire of the United States to locate other Indians and freedmen thereon," etc. The words of the grant are even stronger in the Creek and Seminole treaties than in the Choctaw and Chickasaw treaty. The Choctaws and Chickasaws "cede," but the Creeks and Seminoles "cede and convey."

These trusts in the Choctaw and Chickasaw treaty of 1866 are implied in the language of the third article, in which the words of conveyance, the statement of the consideration, and the arrangements for the freedmen are placed in such juxtaposition as not only to warrant, but to necessitate, the inference that it was the object of the parties, and the effect of the treaties, to authorize the United States to locate upon these lands Indians whose ranges were not embraced within the limits designated in

the treaty of 1855, and also to locate Choctaw and Chickasaw freedmen thereon, and that the cession was encumbered by corresponding trusts.

If this be not true, if the Choctaw and Chickasaw deed of 1866 was an absolute deed, while those of the Creeks and Seminoles were only deeds in trust, then gross injustice was practiced upon the Choctaws and Chickasaws by the United States in 1866, for the Creeks then received $325,362 for a deed in trust of only 2,169,080 acres of land, and the Seminoles received $975,168 for a deed in trust of only 3,250,560 acres; but for 7,713,239 acres of land, which had been previously held by the United States under a gratuitous lease for thirty-six years, the Choctaws and Chickasaws received not a single penny, unless the $300,000 provided for the freedmen be erroneously reckoned as compensation to the Choctaws and Chickasaws for the grant. And now the President having, in 1889, paid the Creeks for the same lands the additional sum of $2,280,857, and having, in the same year, paid the Seminoles for the same lands an additional sum of $1,912,942.02, has, for almost twelve months, refused to pay the Choctaws and Chickasaws the amount appropriated by the act of March 3, 1891.

The third article of the treaty of 1866, standing alone, shows a cession by the Choctaws and Chickasaws to the United States of 7,713,239 acres of land, unsurpassed in point of fertility by any body of land of equal area within the limits of the United States. If the sum of $300,000, named in this article, constituted the sole consideration for the conveyance, and the United States became the absolute owners of the land in their own right, and not the mere grantees of a trust estate therein, then the remarkable spectacle is presented of a purchase by the United States from their feeble and dependent "wards" of 7,713,239

acres of land, then worth in money more than 10,000,000 and now worth more than 40,000,000, for the nominal consideration of $300,000, which sum of $300,000 was to remain the property of the United States if the freedmen should not be removed from the Chickasaw and Choctaw nations, or become citizens of those nations, but was to be paid to the freedmen if they should be removed, and was only to be paid to the Choctaws and Chickasaws in the event that they should confer citizenship upon the freedmen and the freedmen should not be removed. Was such a bargain ever before made between a powerful republican government and a dependent Indian tribe? Was such a bargain ever made between an honest guardian and a helpless "ward"?

The treaty between the United States and Spain, by which the United States ceded these lands to Spain, in part payment for Florida, which was ratified February 19, 1821, is designated by the President as the treaty of 1819. And he designates the treaty by which the United States had previously ceded the same lands to the Choctaws as the treaty of 1820. He says:

"The boundary between the Louisiana purchase and the Spanish possession, by our treaty of 1819 with Spain, was, as to these lands, fixed upon the one hundredth degree of west longitude. Our treaty with the Choctaws and Chickasaws, made in 1820, extended their grant to the limit of our possessions. It followed, of course, that these lands were included within the bounds of the State of Texas, when that State was admitted to the Union, and the release of the Choctaws and Chickasaws, whatever it was worth, operated for the benefit of the State of Texas, and not of the United States."

These statements are altogether erroneous. They mean that the lands in question had been sold to Spain before

the Choctaw treaty of 1820 was made, and so were not ceded to the Choctaws by the treaty of 1820, and, therefore, the release of 1855 operated for the benefit of Texas, whose title was derived from Spain, and not for the benefit of the United States. But the facts are as follows:

The district west of the one hundredth meridian, as already shown, belonged to France, as a part of the province of Louisiana, from 1685 to 1762. In 1762 it was ceded by France to Spain. In 1800 it was retroceded by Spain to France. In 1803 it was ceded by France to the United States. In 1820 it was ceded by the United States to the Choctaws in part payment for their lands east of the Mississippi River. In 1821, while this district was the property of the Choctaws, the United States, without their consent or knowledge, ceded it to Spain in part payment for Florida. It afterwards became successively the property of Mexico and Texas. (American State Papers, vol. 2, pp. 574, 575, 630, 634, 637, 663, 664; vol. 4, pp. 471, 473, 478, 479; Henry Clay's speech, House of Representatives, April 3, 1820; sixteen European maps, eighteenth century.)

The Spanish treaty was negotiated in 1819; but it was most vehemently opposed in the Congress of the United States and was rejected by the King of Spain. While this rejected treaty was dead the United States, in 1820, conveyed the same land to the Choctaws, without disclosing to the Choctaws the facts connected with the defunct Spanish treaty. After the treaty had been dead and buried nearly two years, it experienced a resurrection and a ratification in 1821.

The Government then found itself in this embarrassing predicament: The Choctaws, by the treaty of 1820, had conveyed to the United States all their lands in the State of Mississippi, and in payment therefor the United States

had conveyed to the Choctaws all the lands included within certain defined boundaries west of the Mississippi River. The deed to the Choctaws embraced the district west of the one hundredth meridian, but afterwards, in 1821, the United States, without the consent or knowledge of the Choctaws, conveyed the same lands to Spain in part payment for Florida. It then became obligatory upon the United States, as already indicated, to take one of four courses, either to reconvey to the Choctaws a part of their lands in the State of Mississippi, or to convey to the Choctaws additional lands west of the Mississippi River, or to surrender the treaty of 1820 altogether and restore to the Choctaws all their lands in the State of Mississippi, and receive back the lands ceded to them west of the Mississippi River, or, finally, to compensate the Choctaws in money for those lands west of the one hundredth meridian which had been sold to, and paid for, by them, and subsequently, without their consent, conveyed to Spain. The United States chose the latter course, and by the treaty of 1855, for the sum of $800,000, secured from the Choctaws a quitclaim of their title to these lands and a lease of the lands between the ninety-eighth and one hundredth meridians of west longitude. That a large part of this consideration must have applied to the lease the President says:

"It seems probable that a very considerable part of this consideration must have related to the leased lands, because these were the lands in which the Indian title was recognized and the treaty gave to the United States a permanent right of occupation by friendly Indians."

One of the grounds assigned for the President's opinion is that the Indian title to the leased lands "was recognized" by the United States. This implies that the Indian title to the lands west of the one hundredth meridian

was not recognized by the United States. But your committee think that this fact, if it were a fact, would have no bearing whatever upon the question of the apportionment of the consideration of $800,000 as between the conveyance and the lease. The Indians themselves recognized the fact that the legal title conveyed to them in 1820 had been extinguished by the conveyance to Spain in 1821. They knew that the United States, a sovereign power, invested with the right of eminent domain, had ceded their lands, by a valid treaty, to the King of Spain. But they believed that the ratification of the Spanish treaty in 1821 had not extinguished their right of reclamation against the United States for this transfer of their lands without their consent to a foreign power.

Your committee, therefore, believe that the entire sum of $800,000, paid, in pursuance of the treaty of 1855, was but a small part of the value of the 6,589,440 acres of land west of the one hundredth meridian, and that the whole of that sum was fairly applicable to the quitclaim or release of that land west of the one hundredth meridian.

The President says:

"Our treaty with the Choctaws and Chickasaws, made in 1820, extended their grant to the limit of our possessions. It followed, of course, that these lands were included within the boundaries of the State of Texas when that State was admitted to the Union, and the release of the Choctaws and Chickasaws, whatever it was worth, operated for the benefit of the State of Texas, and not of the United States."

He thinks that when the Choctaws and Chickasaws, for the sum of $800,000, relinquished their right of reclamation against the United States, for the alienation of their lands, by a release or quitclaim of their interests in those lands, this release "operated for the benefit not of the

United States, but of the owner deriving title from Spain." But the Chickasaws assert, with good reason, as your committee think, that when they furnished the United States 6,589,440 acres of land, which was actually applied by the United States in part payment for Florida, the transaction inured to the benefit of the United States. They think that when an individual furnishes a debtor means to pay his debts, the transaction inures to the benefit of the debtor. But, then, it is not true that "our treaty from the Choctaws and Chickasaws, made in 1820, extended their grant to the limit of our possessions." There was no such provision in the treaty of 1820. It occurred for the first time in the treaty of 1830, made ten years after the land had been sold to the Choctaws; and while it did deprive the Choctaws of that part of their land which was sold to Spain in 1821, it did not curtail the area actually ceded by the United States to the Choctaws in 1820, nor did it impair their right of reclamation against the United States.

The President thinks that if an Indian nation, being the owner of a tract of land purchased from the United States and fully paid for, cedes the land back to the United States by a conveyance in trust, the terms of the trust permitting the location of other Indians and of freedmen upon the land, but interdicting the location of white men thereon, the United States can evade the interdict by locating other Indians upon the land and purchasing from them a release from the interdict, and can then open the land to settlement by white citizens. He thinks that upon the assumption that the Choctaws and Chickasaws, in their lease of 1855 and in their cession of 1866, interdicted the location of whites upon the leased district, it was nevertheless competent for the United States to cede the land to the Cheyennes and Arapahoes and then purchase

from the Cheyennes and Arapahoes their interest in the land, with the right to open it to "white settlement," and that, by this device, the United States could evade the interdict of the Choctaws and Chickasaws. He thinks that if the United States, after paying the Cheyennes and Arapahoes for their interest in the lands, should be required to pay the Choctaws and Chickasaws for exemption from the restrictions imposed by their conveyance, then the United States would, in effect, be required to pay twice for the privilege of opening the land to "white settlement," or, as he expresses it, would be compelled to pay twice for the same land.

On this point your committee are constrained to differ in opinion with the President. It certainly was competent for the United States to locate Cheyennes and Arapahoes upon these lands and afterward to pay them whatever the United States saw fit to pay for a quitclaim of their interest in the land and for their consent to the location of whites thereon. But whatever effect such an arrangement might have as between the United States and the Cheyennes and Arapahoes, it could have no effect whatever to release the United States from the restrictions imposed in the treaties of the Choctaws and Chickasaws. In the same way an individual holding land in trust might, by purchasing from his own grantee a release from the obligation of the trust imposed by the grantor, divest his title of the trust and invest himself with an absolute title, and then resist his grantor's demand for redress by setting up his grantee's release and his own payment to his grantee for such release. If the United States saw fit not only to give the Cheyennes and Arapahoes allotments in severalty of a part of the land, but also to pay them money for their quitclaim of the residue and for their consent to its occupation by white settlers, and attempted by that

arrangement to evade the terms of the Choctaw and Chickasaw lease of 1855 and cession of 1866, the United States ought to bear the expense of this speculation themselves and can not rightfully recoup that expense from the Choctaws and Chickasaws.

But the President thinks that all or a large part of the money promised to the Cheyennes and Arapahoes, in the agreement of 1890, is to be paid as compensation for their interest in lands within the leased district. This is a mistake. The facts are as follows:

By the Cheyenne and Arapaho treaty of 1867 the United States set apart for the Cheyennes and Arapahoes, and for such other friendly Indians as they should be willing to admit among them, the entire country bounded on the north by the south line of the State of Kansas, on the east by the Arkansas River, on the south and west by the Cimarron River (15 Stat., 594). This tract contained over 5,207,000 acres of land.

By an Executive order, dated August 10, 1869, the President set apart, for the Cheyennes and Arapahoes, the country between the thirty-fifth and thirty-seventh parallels of north latitude, and between the eastern line of Texas and the western line of Oklahoma. This country contains 4,270,771 acres of land. (Commissioner's report, 1888, p. 89.) Of this land, 1,781,611 acres lie north of the Canadian River and outside of the leased district, and 2,489,160 acres lie south of the Canadian River and within the leased district. The authority for the Executive order, setting this land apart for the Cheyennes and Arapahoes, was not conferred by any specific constitutional or statutory provision. Its origin is nebulous, and its origin and nature are not yet well defined.

When, by virtue of the Executive order of August 10, 1869, the Cheyennes and Arapahoes were located in the

country north and south of the Canadian River, they already held, under a treaty duly ratified by the Senate, the tract of 5,000,000 acres between the Arkansas and Cimarron rivers. And yet the President is of the opinion that it was competent for the executive authorities of the United States to substitute a reservation set apart by Executive order for a reservation set apart by a duly ratified treaty, with the effect of investing the Cheyennes and Arapahoes with such a title to the 2,489,160 acres south of the Canadian River that a quitclaim of their interest therein to the United States will extinguish not only their own interest, but also that of the Choctaws and Chickasaws. He thinks that to pay the Choctaws and Chickasaws, after paying the Cheyennes and Arapahoes, would be to pay twice for the same land.

Your committee think that this Executive order was not effective to vest in 3,000 Cheyennes and Arapahoes such a title to 4,270,771 acres of land, in addition to the 5,000,000 previously set apart by treaty, between the Arkansas and Cimarron rivers, as to make the quitclaim of the Cheyennes and Arapahoes effective, not only to extinguish their own interest, but also that of the Choctaws and Chickasaws.

But Congress will not lose sight of the real character of the Cheyenne and Arapaho agreement of 1890. By that agreement the Cheyennes and Arapahoes quitclaimed to the United States, not only the 2,489,160 acres of land within the leased district, but also the 1,781,611 acres north of the Canadian River, and more than 5,000,000 between the Arkansas and Cimarron rivers, in all 9,630,771 acres. Of this aggregate amount only one-fourth was within the leased district. And yet although 96,000 acres of land within the leased district are given to the Cheyennes and Arapahoes, in severalty, the President is of the opinion that the sum of $1,500,000 promised to the

Cheyennes and Arapahoes in the treaty of 1890 is to be paid mainly, not for the 7,348,611 acres outside of the leased district, but for the 2,489,160 acres within that district.

It is difficult to reconcile this opinion of the President with the statement, made by Secretary Noble, in the "compilation" printed on page 9, of Senate Ex. Doc. No. 78, Fifty-first Congress, first session, in the following words:

"The select committee of the Senate, in its report on the removal of the Northern Cheyennes, etc., in speaking of the lands set apart for the Cheyennes and Arapahoes by the Executive order of August 10, 1869, say that 'it was never intended to be more than a temporary abiding place for these tribes, where they were to stop until the United States could extinguish the claim of the Cherokees to the lands included in the treaties with the Arapahoes and Cheyennes.'" (Senate Report No. 708, Forty-sixth Congress, second session, page 2.)

Nor is it easy to reconcile this opinion of the President with the following statements, made by Secretary Noble, in the "compilation" printed on pages 7, 8, 9, and 10, Senate Ex. Doc. No. 78, first session Fifty-first Congress, in the following words:

"CHEYENNE AND ARAPAHOE RESERVATION ON A PORTION OF THE OUTLET.

"By the second article of the treaty with the Cheyennes and Arapahoes, concluded October 21, 1867 (15 Stats., 593), a tract of country west of the ninety-sixth degree, bounded by the Arkansas River on the east, the thirty-seventh parallel of north latitude being the southern boundary line of the State of Kansas on the north, and the Cimarron or Red Fork of the Arkansas River on the

west and south, in which boundaries are included 4,294,-734 acres of the Cherokee lands west of the ninety-sixth degree, all of which lies west of the Arkansas River, was set apart for the undisturbed use and occupation of said Indians, and for such other friendly Indians as from time to time, they might be willing, with the consent of the United States, to admit among them.

"This tract (so far as it relates to Cherokee lands) is indicated on the map by a dark-blue line and numbered 2.

"This cession also covers 730,162 acres, including 53,006 acres subsequently set apart for the Pawnees, of the lands ceded to the United States by the third article of the treaty of 1866 with the Creek Nation of Indians (14 Stat., 785) for the purpose of settling friendly Indians thereon, lying north of the Arkansas River and south of the Cherokee line referred to; also that portion of the unceded Creek territory lying north of the Arkansas River, south of the Cherokee line, and east of the line dividing the Creek domain under the treaty of 1866, numbered on map 23½. But as to this latter tract the Cheyennes and Arapahoes acquired the title. (See United States *v.* Ben Reese, above referred to.)

"These lands, it must be conceded, were secured to these tribes by solemn treaty stipulation, and they have made no treaty ceding them nor agreement of relinquishment that is of any binding force or effect. They have committed no act of forfeiture. Their title stands to-day as it did at the date of the ratification of the treaty of 1867. As between the United States and the Cheyennes and Arapahoes the title to the lands is in these Indians, and they have a perfect and indisputable right to now remove to that reservation and enjoy all the privileges guaranteed to them by the treaty."

But then Secretary Noble was actually notified by the

commission, in the spring of 1891, that the amount allow to the Cheyennes and Arapahoes for their interest, not the "leased district," but in the entire Executive or reservation, was $250,000. Why this information not communicated to the President, by the Secreta your committee are not advised.

This would make the amount allowed for their land the "leased district" less than $150,000, or less tha cents per acre.

Your committee, therefore, conclude that the Uni States are not the absolute owners of the leased distr but only hold a trust estate therein; and they submit following recapitulation of the grounds on which this c clusion is based:

(1) Under the treaty of 1855 the sum of $800,000 paid for the release of the land west of the one hundre meridian and the lease of the land between the nin eighth and one-hundredth meridians.

(2) Much the larger part of that payment was appl ble to the release of the land west of the one hundre meridian, and a small part, if any, of it to the lease of land between the ninety-eighth and one hundre meridians.

(3) In 1865 the commissioners, appointed by the P ident, officially notified the five civilized tribes, at Smith, that the lands to be treated for were to be acqu for the use, not of white men, but of Indians.

(4) The Choctaws and Chickasaws, as well as the o civilized tribes, formally accepted that basis of the posed negotiations, and upon that basis consented treat, and did treat, in 1865.

(5) When the commissioners of the Choctaws Chickasaws met the commissioners of the United St to negotiate the treaty of 1866, there is no pretense

anything had been paid by the United States towards the purchase of the land between the ninety-eighth and one hundredth meridians, although the United States had held that land under lease for eleven years.

(6) The treaty of 1866 provided no compensation for the transfer of the absolute ownership of the leased district. The sum of $300,000, named in the third section of that treaty, was to be paid to the freedmen, if they should be removed, but was to remain the property of the United States if citizenship should not be conferred upon the freedmen, and was only to be paid to the Choctaws and Chickasaws in the event that citizenship should be conferred upon the freedmen and they should refuse to emigrate.

(7) The sum of $300,000, named in the treaty of 1866, was not to compensate the Choctaws and Chickasaws for anything except for conferring citizenship and a right to forty acres of land each, upon the freedmen. If citizenship should not be conferred upon the freedmen, the United States, by the terms of the treaty, were to acquire whatever new interest the treaty conveyed in the land, without paying the Choctaws and Chickasaws a dollar for such conveyance.

(8) The effect of the treaty of 1866 was to authorize the Government of the United States, whenever it should remove the freedmen, to locate them in the leased district.

(9) It was also the effect of the treaty of 1866 to open the leased district to settlement by friendly Indians in general; for the treaty of 1866 omitted the inhibition of the lease of 1855, which excluded from that district all Indians, except those residing or ranging within certain specified limits.

(10) The Creeks and Seminoles entered into treaties with the United States in 1866 upon the basis which had

been proposed to and accepted by the five civilized tribes in 1865, and which excluded white settlers from the lands to be ceded to the United States.

(11) The United States, in 1866, paid the Creeks 30 cents per acre for 3,250,560 acres, and also paid the Seminoles $325,362 for 2,169,080 acres, but paid the Choctaws and Chickasaws nothing for 7,713,239 acres ceded, unless the sum of $300,000 provided as compensation for the possible grant of citizenship to the freedmen is to be regarded as payment for the land.

(12) In 1889 the United States paid the Creeks $2,280,857.10 for a release of their interest in the lands ceded by them in 1866, and also paid the Seminoles $1,912,942.02 for a release of their interest in the lands ceded by them in 1866.

(13) To assume that the cession of 1866 was intended by the parties to the treaty, as an absolute conveyance, is to assume that the Choctaws and Chickasaws intended to convey, and the United States intended to acquire, without any compensation whatever, 7,713,239 acres of land, worth more than $10,000,000 in 1866 and worth more than $40,000,000 at the present time.

(14) As the Supreme Court has often held, treaties between the United States and the Indian tribes are not without necessity to be so construed as to work injustice upon the "wards of the nation;" but a construction of the treaty of 1866 which makes that treaty the conveyance of an absolute title to the United States will inflict a grievous and unnecessary wrong upon the Choctaw and Chickasaw nations.

(15) The propositions submitted to the civilized tribes by the United States in 1865 as the basis of the negotiation of the treaties of 1866, the provisions of the treaty of 1866, the facts and circumstances attending the mak-

ing of that treaty, and the contemporaneous dealings of the United States with the Creeks and Seminoles necessitate the conclusion that the cession made in the Choctaw and Chickasaw treaty of 1866 was intended as a conveyance, not of an absolute title, but only of a trust estate.

The President makes the following statement:

"In view of the fact that the stipulations of the treaty of 1866 in behalf of the freedmen of these tribes have not, especially in the case of the Chickasaws, been complied with, it would seem that the United States should, in a distribution of the money, have made suitable provisions in their behalf. The Chickasaws have steadfastly refused to admit the freedmen to citizenship, as they stipulated to do in the treaty referred to, and their condition in that tribe, and in a lesser degree in the other, strongly calls for the protective intervention of Congress.

In this matter the President has certainly been misinformed. The Chickasaws never stipulated in the treaty of 1866 or in any other treaty to admit the freedmen to citizenship, and the "protective intervention of Congress" suggested by the President would, if carried out on this line, be an act of the grossest injustice. It was provided in the treaty of 1866 that, if the Choctaws and Chickasaws should elect to admit to citizenship the freedmen, certain specified arrangements should be made, and that, if they should elect not to admit them to citizenship, then certain other specified arrangements should be made. There was no promise, express or implied, by either nation to confer citizenship upon the freedmen. Nor has either of these two nations failed to comply with a single stipulation of the treaty of 1866 or of any other treaty relating to the freedmen. Nor is the condition of the freedmen in either nation such as to call for or justify any intervention by Congress on their behalf, to the prejudice of the Choctaws

and Chickasaws. The Choctaws admitted their freedmen to citizenship. They were able to do this with safety, because the freedmen constituted only an insignificant minority of the population of the nation. But the Chickasaws declined to confer citizenship upon their freedmen.

It is not true that the lot of freedmen is a hard one, either in the Choctaw or in the Chickasaw nation. On the contrary, their condition there is better than in the United States. In the United States freedom has been given to the freedmen, but nothing else has been given to them. They must buy or lease their land and pay their taxes or have no land. In the Choctaw and Chickasaw nations every freedman uses, without paying rent or taxes, all the land he sees fit to use, and he is protected in his person and property as completely as any Indian or white man. Article 4 of the treaty contains the following provision:

"And they agree, on the part of their respective nations, that all laws shall be equal in their operation upon the Choctaws and Chickasaws and negroes, and that no distinction affecting the latter shall at any time be made, and that they shall be treated with kindness and protected against injury; and they further agree that while the said freedmen, now in the Choctaw and Chickasaw nations, remain in said nations, respectively, they shall be entitled to as much land as they may cultivate for the support of themselves and families, in cases where they do not support themselves and families by hiring, not interfering with existing improvements, without the consent of the occupant."

These promises have all been fairly kept by the Choctaws and Chickasaws.

The President seems to think that the freedmen ought to participate in the distribution of the moneys of the

Choctaws and Chickasaws appropriated by the act of March 3, 1891, and seems to completely overlook the plain letter of article 3 of the treaty of 1866, in which participation "in the annuities, moneys, and public domain claimed by or belonging to said nations, respectively," is expressly excepted from the rights proposed to be conferred upon the freedmen, and the further fact that the act of the Choctaw council admitting these freedmen to citizenship so excluded them without any objection on the part of the United States.

There is absolutely no sort of foundation for this claim of the President, but it is plainly in violation of the agreement made in this treaty of Fort Smith. These nations had the right under this treaty to incorporate these freedmen into their nations or not, but there was at no time a suggestion that they should, if adopted, be allowed to participate in the "annuities, moneys, or public domain."

The President seems to intimate that the white citizens of these nations are entitled to some sort of protection in the distribution of this money at the hands of Congress, though he does not distinctly say so. Upon this very question the Attorney-General of the United States uses this language:

"The persons entitled to such distribution, the evidence necessary to establish their claims, and the manner of such distribution are all matters to be regulated by the laws of the Choctaw and Chickasaw nations, respectively, subject doubtless to the rule that such laws must not be in conflict with the Constitution and laws of the United States."

This seems to this committee to be unquestionably the law of this case. * *

Soon after the passage of the act of March 3, 1891, the Choctaws and Chickasaws prepared two forms of release;

and two other forms were prepared in the Indian Office. The Choctaws and Chickasaws gave formal notice to the United States that they were ready to execute releases in either or any of these four forms, or in any other form satisfactory to the President; but the President, instead of approving or disapproving of these releases, conceived it to be within his province to approve or disapprove of the law itself.

The United States, then, by grant from the Choctaw and Chickasaw nations, hold a trust estate in the lands now occupied by the Cheyennes and Arapahoes. The terms of the trust under which these lands are held prohibit the United States from opening the same to settlement by citizens of the United States. Congress, by the act approved March 3, 1891, appropriated the sum of $2,991,450 to compensate the Choctaws and Chickasaws for their interest in said lands, to the end that they might become the absolute property of the United States, divested of the trust, and open to settlement like other public lands. That appropriation was made immediately available.

For a period of more than a year the executive authorities of the United States have failed to pay any part of the money so appropriated for the extinguishment of the interest of the Choctaws and Chickasaws in these lands; but meantime they have proceeded to make the preliminary arrangements necessary to prepare the land for public settlement, and have asked and obtained from Congress now in session, an appropriation for the completion of such arrangements with the avowed purpose of speedily throwing the lands open to occupation by citizens of the United States.

Moreover, Mr. Cannon stated in the House of Representatives on the 2d day of March, 1891, that Secretary

Noble had said to him that "if the Cheyenne and Arapaho agreement was ratified the land would be thrown open to settlement." And Secretary Noble, in his letter of January 4, 1892, to the President, printed on the first page of Senate Ex. Doc., No. 14, says:

"I have the honor to submit herewith an agreement made and entered into by and between the Cherokee Commission and the Wichita and affiliated bands of Indians in the Territory of Oklahoma, and also a report of the said commission transmitting the agreement.

"In my judgment the Choctaws and Chickasaws have no legal or equitable right for compensation for any of the lands covered by this agreement, and hence no provision is made therefor in the draft of the bill herewith presented."

Your committee thinks that if an attempt shall be made to convert the trust estate of the United States into an absolute estate, without compensation to the Choctaws and Chickasaws for their interest in said lands, and to transfer the lands to citizens of the United States, the Choctaws and Chickasaws will have the right to regard such action on the part of the United States as a forfeiture of the trust estate now held by the United States therein, and to assert the right of the Choctaws and Chickasaws to resume the full ownership and actual possession of said lands, and also to resort to such measures as shall be proper to test the validity of any transfers of said lands to white men made or attempted by the Executive Department of the Government.

Your committee, therefore, recommend the adoption of the following resolution of the Senate:

Resolved, That for reasons set forth in the report of the Committee on Indian Affairs upon the President's message of February 18, 1892, upon the appropriation of March 3, 1891, for payment to the Choctaw and Chickasaw nations

for their interest in the Cheyenne and Arapahoe Reservation, in the Indian Territory, submitted with this resolution, that it is the opinion of the Senate that there is no sufficient reason for interference in the due execution of the law referred to.

No. 115. Extract from Report of Commissioner of Indian Affairs for 1864, pages 33 and 34.

Under these circumstances, I feel that I cannot too strongly urge the importance of preserving the Indian country for the use of the Indians alone, and in all treaties or other arrangements which may hereinafter be made with its former owners insisting upon, and, if need be, enforcing such terms as will secure ample homes within that country for all such tribes as, from time to time, it may be found practicable and expedient to remove thereto.

No. 116. Prior to 1866 the whole area of the Indian Territory, except a small portion in the northeast corner which belonged to the Senecas, Shawnees, and Quapaws, was embraced in the grants made and patented to the Cherokee, Choctaw, and Creek Indians, under the treaties with said tribes, respectively.

The several treaties under which the title of the United States was conveyed to said tribes are as follows:

CHEROKEE TREATIES.

May 6, 1828, 7 Statutes, p. 310.
February 14, 1833, 7 Statutes, p. 414.
December 29, 1835, 7 Statutes, p. 478.
Patent issued to the Cherokee Nation December 31, 1838.

CHOCTAW TREATIES.

October 18, 1820, 7 Statutes, p. 210.
January 20, 1825, 7 Statutes, p. 234.
September 21, 1830, 7 Statutes, p. 333.
Patent issued to the Choctaw Nation March 23, 1842.

CREEK TREATIES.

January 24, 1826, 7 Statutes, p. 286.
March 24, 1833, 7 Statutes, p. 366.
February 14, 1833, 7 Statutes, p. 417.
Patent issued to the Creek Nation August 11, 1852.

The treaties with the Senecas, Shawnees, and Quapaws were the treaties, respectively, of February 28, 1831, 7 Stat., 348; July 20, 1831, 7 Stat., 351; and May 13, 1833, 7 Stat., 424.

By agreements approved by the United States the Choctaws conveyed a portion of their lands to the Chickasaws, and the Creeks in like manner conveyed a portion of their lands to the Seminoles.

The titles of the several tribes under the foregoing treaties and agreements were subject to the following conditions:

1st. That the land should not be conveyed by them except to the United States.

2d. If the Indians abandoned the land, or became extinct, the lands were to revert to the United States.

It was stipulated by the United States that the Indians should be protected in their homes and lands against all interference by any person or persons.

The treaties by which the United States reacquired title to any of the lands in the Indian Territory, or obtained the conditional right to control the disposal of any of said

lands, were the treaties with the Seminoles of March 21, 1866; with the Choctaws and Chickasaws of April 28, 1866; with the Creeks of June 14, 1866; and with the Cherokees of July 19, 1866.

By the third article of the treaty with the Seminoles (14 Stat., 756), said Indians ceded to the United States about 2,100,000 acres of land, "in compliance with the desire of the United States to locate other Indians and freedmen thereon."

In compliance with the same desire, the Creeks, by the 3d article of the treaty with that tribe (14 Stat., 786), ceded about 3,200,000 acres to the United States, "to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon."

The freedmen referred to were the former slaves of Indian tribes. The treaty stipulations, as uniformly understood and construed, have no application to any other freedmen than the persons freed from Indian bondage. They relate exclusively to friendly Indians and to Indian freedmen of other tribes in the Indian Territory whom it was the desire of the United States to provide with permanent homes on the lands ceded for that purpose.

The lands reconveyed to the United States by the foregoing treaties are therefore held subject to the trust named. They can be appropriated only to the uses specified, and to those uses only by the United States, and then only in the manner provided for by law. Miscellaneous immigration even by the intended beneficiaries would be unauthorized and illegal.

The Choctaw and Chickasaw cession of April 28, 1866 (14th Stat., 769), was by the 10th section thereof made subject to the conditions of the compact of June 22, 1855 (11th Stat., 613), by the 9th article of which it was stipu-

lated that the lands should be appropriated for the permanent settlement of such tribes or bands of Indians as the United States might desire to locate thereon.

The lands embraced in the Choctaw and Chickasaw cession were also included in a definite district established by the stipulations of the treaty of 1855, pursuant to the act of Congress of May 28, 1830, the United States re-engaging by the 7th article of said treaty to remove and keep out from that district all intruders.

* * * * * * *

The title of the United States to lands in the Indian Territory is, as heretofore shown, subject to specific trusts, and it is not within the lawful power of either the legislative or executive departments of the government to annihilate such trusts, or to avoid the obligations arising thereunder.

Such trusts are for the benefit of Indian tribes and Indian freedmen. The "freedmen of the United States" are not comprehended within the policy or intention of the treaty provisions, and said lands have accordingly *not* "been purchased for the use and occupation" of the colored people of any of the States. Senate Ex. Doc. No. 111, 47th Cong., 1st Sess., pp. 2, 3, 4.

No. 117. The annexed statement of John C. Carr is a correct copy of the original, dated November 17, 1819, now on file in the Indian Office, Miscellaneous Files.

NATCHITOCHES, 17*th Nov.*, 1819.

SIR: I have the honor of acknowledging the receipt of your circular letter and enclosure, of the 17th Sept. last, and have only to observe that the order therein contained shall be implicitly obeyed.

The enclosed statement of Indian population, in the province of Texas, I procured from an intelligent gentleman, who has resided, a considerable time, in the Comanche nation, and, from its coincidence with other statements in my possession, I believe it to be as nearly correct as, under existing circumstances, it would be possible to procure.

About fifteen days ago, a detachment of about 250 Spanish cavalry, under the command of Don Ignatio Perez, surprised Nacogdoches, then occuped by a few of the followers of Dr. Long, who were nearly all made prisoners. The detachment then advanced to the Sabine River, burning and destroying all the settlements they found on the way, and, afterwards, divided themselves into small parties, for the purpose of intercepting the Comanche traders, many of whom have fallen into their hands. Their main body, composed of about 1,000 men, is encamped on the Trinity River. It is presumed they intend to establish a post at Nacogdoches, with the view of cutting off all intercourse between our traders and the Indian tribes within the province.

With great respect, I have the honor to be, sir,

Your obt. servt.,

JOHN C. CARR.

Hon'ble J. C. CALHOUN,

Secy. of War,

Washington City.

No. 118. Report of Superintendent of Emigration, accompanying Report of Commissioner for 1835, page 287.

EMIGRATION OF INDIANS.

OFFICE COM. GEN. OF SUBSISTENCE,
November 12, 1835.

To the Hon. LEWIS CASS,
Secretary of War.

SIR: I have the honor to submit, for your consideration, the accompanying reports, in conformity with your directions of the 4th of September, viz: A report of the amount of funds remitted to the different agents and disbursing officers, for the expenses of Indian emigration, during the first three quarters of the present year, and the amount for which accounts have been rendered in the same period; and a report of the number of Indians that have been removed, since the 30th day of September, 1834; the whole number of Indians west of the Mississippi, distinguishing the native from the emigrated tribes; the quantity of land assigned to each, and its situation; and the number of Indians yet to be removed under treaty stipulation. * *

Respectfully, your obdt. serv't.

GEO. GIBSON, *C. G. S.*

* * * * * * *

Native tribes, and their numbers, resident west of the Mississippi.

*

Pawnees..... 10,000

* *

Caddoes..... *2,000

* *

No. 119. Extract from a report of Capt. J. Brown, dated July 18, 1837, on file in the Indian Office, indorsed

*The agent has reported these Indians at upwards of two thousand—(The Wichitas are not mentioned.)

O. I. A., West[n] Sup[y], B, 270.—Printed in Rep. 18
p. 583.

LITTLE ROCK, *July 18th*, 183

SIR: * * In obedience to instructions of the 22
March last, which were received while at Washing
requiring me, at a convenient time, to address to y
office a communication upon the following subjects,

* * * * * *

The condition and resources of the several tribe
Indians residing in the Acting Superintendency of
Southwestern Territory * * have the honor to s
mit the following remarks: * * Under this head
Choctaws, from their location and early emigration, a
first. * The Cherokees. * * The Creeks and S
noles. * * Senecas and Shawnees. * * The
paws. * * Osages. * * The foregoing compris
the tribes of Indians residing within the Acting Supe
tendency of the Southwestern Territory, and, with
exception of the last mentioned tribe (Osages) have
emigrated to that country, the greater portion
1831. * *

Very respectfully, I have the honor to be
Your obdt. servt.,
J. BROWN, *Capt. U. S. A.,*
Pr. Disg. Agt. Ind. De

C. A. HARRIS, Esq.,
Commr. of Ind. Affrs.,
Washington, D. C.

No. 120. The annexed documents are, first, an acc
extract from a report of A. M. M. Upshaw, Indian a
dated May 27, 1844, and second, a true copy of a
dorsement thereon, by T. Hartley Crawford, Commiss

of Indian Affairs. Both are taken from a file in the In-office, indorsed O. I. A. Miscell. U. 162.

CHICKASAW AGENCY, *May* 27, 1844.

SIR: * * I have just heard that the two boys, that were missing from Trinity River, in the Republic of Texas, about the last of February, or first of March, ult. (at the time that their father, mother and two children were murdered in the most shocking manner, the lady had her limbs cut off, at her body), are now among the Wichitaw Indians, who live north of Red River and south of the False Washita, and are within the Chickasaw District of the Choctaw Nation. My information is certainly correct. Capt. Ish-tic-i-u-ka-tubby, a Chickasaw, in whom every confidence can be placed, brought in the information.

You will please excuse me for giving you my opinion of what ought to be done. It is this, that some discreet person should be sent there, with a tolerably strong command, and induce those Indians to give up the prisoners, and also the Indians who committed the murder, and let them know distinctly that they will not be permitted to live in this country and go into Texas (a republic that we are on the most friendly terms with) and commit murder, and then flee into this for protection.

I shall send a copy of this letter to the commanding general of this department, and also one to Maj. Wm. Armstrong, acting superintendent.

With high respect, I have the honor to be
Your mo. Obed. Servt.,

A. M. M. UPSHAW.

Hon. T. HARTLEY CRAWFORD,
Com. of Indian Affairs.

(Endorsement.)

Respectfully referred to the Secretary of War. The outrage was committed on Texan citizens, but by wild Indians who are as much inhabitants of that republic as of our territory. The murderers should be delivered up to Texas, and the lads liberated; and as they are now within our limits, the matter is respectfully submitted.

T. HARTLEY CRAWFORD.

JUNE 26, 1844.

No. 121. Report of Agent accompanying Report of Commissioner for 1845, page 525.

CHICKASAW AGENCY, *August* 16, 1845.

SIR: * * In the extreme western part of the Chickasaw district, there are several tribes, or parts of tribes, settled, which are generally called the wild Indians, viz: The Kechi, the Taw-a-ash, the Witchataw and Wacoes, and, on Washita, about ten miles from the agency, three-fourths of the Caddo Indians have settled; but there have been but few complaints of their having committed depredations upon the Chickasaws in the last year. * *

Very respectfully, your most obedient servant,

A. M. M. UPSHAW,
U. S. Agent for Chickasaws.

Col. WM. ARMSTRONG,
Superintendent Western Territory.

No. 122. Report of Commissioner for 1845, page 455.

WAR DEPARTMENT, OFFICE INDIAN AFFAIRS,
November 24, 1845.

* The superintendency of Indian affairs, for the western territory, includes all the Indians south of the

line of the St. Louis superintendency, and as far west as the Rocky mountains, and north of the line of Mexico and Texas. This is a large district, and requires the undivided attention of the present efficient superintendent, owing to the unsettled condition of the Comanches, Witchetaws and other tribes who lead a wandering life. Sometimes being in Texas, and sometimes in the United States, it has been impossible to extend over them the eye of this department. They have neither belonged, hitherto, to the one government nor to the other; and although several attempts have been made to negotiate with them, every effort of the kind has thus far proved unsuccessful. A commission has, this fall, been sent out, under more favorable auspices, and it is confidently expected that a treaty, or treaties, of peace and friendship will be entered into with these wandering tribes. * *

All which is respectfully submitted.

W. MEDILL.

Hon. WM. L. MARCY,
Secretary of War.

No. 123. Extract from Report of Special Indian Agent, on file in the Indian Office, indorsed, O. I. A. Texas, N. 14.

TORREY'S TRADING HOUSE, *June 22d*, 1847.

SIR: * * From the frequent depredations committed by the Wacoes, Witchitas, Tah-wah-carros, and Keechies, I found it necessary, at as early a day as possible, to give them my attention, and, apprehending great personal risk in visiting their villages, well knowing their hostile character, I applied to Capt. Howe, comdr. of this frontier, for an escort of Rangers for that purpose, and to assist in recovering horses that had been stolen from our citizens,

as I was informed, by good authority, that there were a large number of stolen horses in their villages. Capt. Howe refused to furnish me the escort required, upon the ground that he had no orders to send troops into the Indian country. Seeing the great necessity of action, I determined, at all risks, to go to their villages, and, accordingly, engaged the services of a small party of Delaware Indians, six in number, to accompany me.

On application to the chief of the Anadakos, he sent Towiash, 2d chief, with six of his warriors, with me, Jose Maria, the principal chief, having been thrown from his horse and badly injured, was unable to accompany me in person.

On the 10th inst. we arrived at the village of the hostile bands, and finding that the friendly Indians would sustain me in any measures I might adopt towards them, I determined on the boldest course as the best that could be adopted. Accordingly, as soon as the chiefs could be assembled, I made a formal demand of the horses, and threatened them in the strongest terms, if my request was not complied with. After much counciling among themselves, we were invited to attend a council in their village. We attended the council and were treated in a most friendly manner. Our council lasted four days, during which time all matters of difference were discussed at length, and the following conditions agreed upon:

1st. That they were to restore all the horses, mules, &c., that had been stolen, both from whites and friendly Indians, since the treaty was concluded between them and the U. States Commissioners.

2d. That they are not to steal any more horses or mules from the whites or friendly Indians, or commit any act of hostility whatever.

3d. When all the stolen property is given up, they are

to be entitled to all the privileges of the treaty that they had violated, and shall be entitled to the same considerations as other tribes that are friendly with the United States.

In accordance with said agreement, they delivered up 46 head of animals, which was all that were in that village, the largest portion having been driven to the main Witchita village, which is situated on the Witchita River. The chiefs present immediately dispatched men for the horses, which are to be delivered up in the course of the next month. The Keechies, on my arrival at their village, immediately delivered into my possession seven head of stolen horses, which were all that that tribe had stolen. They also gave many proofs of friendship, in the assistance they gave me against the Wacoes, Witchitas, and Tah-wah-caroos. * *

The Caddoes, Anadakos, Wacoes, Tah-wah-caroos, Keechies, and Witchitas, are making corn this year to a considerable extent. The Comanches, Lipans, and Tonka-huas subsist entirely by hunting. * *

I have the honor to be, very respectfully,
Your obt. servt.,

ROBT. S. NEIGHBORS,
Special Ind. Agent.

To Col. W. MEDILL,
Comr. of Indian Affairs, Washington, D. C.

No. 124. Extract from Report of Special Indian Agent, on file in the Indian Office, indorsed Texas, N. 25.

SPECIAL INDIAN AGENCY,
TORREY'S TRADING HOUSE,
Sept. 14th, 1847.

SIR: * * On the 28th I arrived at the village of the Keechies, about one hundred and seventy-five miles above

this place, where I found a considerable body of Indians, of the following tribes, viz: Keechies, Caddoes, Ionies, Wacoes, Tahwahcarros, Wichitas and some few Pawnee Mohaws. They were assembled for the purpose of holding a grand medicine dance, which was in full operation at the time of my arrival, and continued for four days afterwards.

I found the Indians residing in that neighborhood, viz: the Keechies, Wacoes, Wichitas, and Tahwahcarros, (whose village is about six miles farther up the river) in a very contented and happy condition, they having made fine crops of corn, beans, pumpkins, melons, &c. * *

I have the honor to be, very respectfully,
Your obt. servant,
ROBT. S. NEIGHBORS,
Special Indian Agent.

To Col. W. MEDILL,
Com'r of Indian Affairs,
Washington, D. C.

No. 125. Extract from report of Special Indian Agent, on file in the Indian Office, indorsed N. 29, Ex. Doc. No. 8, 30 Cong., 1 Sess., p. 903.

U. STATES SPECIAL INDIAN AGENCY,
October 12, 1847.

SIR: * * The several bands having been much scattered, I could not commence the distribution until the 28th, by which time they were all well represented, there being in attendance the following tribes and bands, viz: the Comanches, Ionies, Caddoes, Anadahkas, Wacoes, Keechies, Wichitas, Tahwaccarras, Tonkahuas, and the bands of Delawares, Shawnees, and Cherokees, that reside in Texas,

also some few Beluxies, Kickapoos, and Pawnee Mohaws. * *

I have the honor to be, very respectfully,
Your obt. servant,
ROBT. S. NEIGHBORS,
Spl. Ind. Agent.

To Col. W. MEDILL,
Comr. Ind. Affairs,
Washington, D. C.

No. 126. Extract from Report of Special Indian Agent, accompanying Report of the Commissioner of Indian Affairs for 1848, pages 578, 580.

Report of R. S. Neighbors, Esq., Special Agent for Texas Indians, from 20th January, to 2d March, 1848.

UNITED STATES SPECIAL INDIAN AGENCY,
TRADING POST NO. 2,
March 2, 1848.

SIR: * * On the morning of the 14th, I arrived at the main camp, which I found to consist of about 250 lodges of Comanches, 50 of Tonkahuas, and 10 of Wichetas. * *

On the 18th I arrived at the camp of the Wacos and Tahwaccarros. I found them perfectly friendly and peaceable, and could trace no act of hostility to them, since my arrangement, as reported on the 22d June last. On the 22d I arrived at the village of the Keechie, and found a considerable number of Indians assembled in the neighborhood, consisting of Caddoes, Ionies, Keechies, and Wacos. The principal body of these tribes had not returned from their winter hunt; but, from the friendly manifestations of those I saw, I was fully assured of their

friendly and peaceful disposition. The only depredation, that can be traced to these bands, is a theft, committed by three Keechies and one Wicheta, who stole twelve horses from our settlements. Immediately on the arrival of the thieves, at camp, the horses were taken away by the chiefs, and eight of them were placed in my hands, to be returned to their owners, with a promise to return the balance, as soon as the hunters returned, the four not recovered being with a party of the Keechies, who had not come in from their winter's hunt. * *

I have the honor to be, very respectfully,

Your obedient servant,

ROBT. S. NEIGHBORS,

United States Special Indian Agent.

To Colonel W. MEDILL,

Commissioner of Indian Affairs,

Washington, D. C.

No. 127. Extracts from report of Special Indian Agent, and from an enclosed letter of C. E. Barnard, both accompanying the report of the Commissioner of Indian Affairs for 1848, pages 587, 588.

UNITED STATES SPECIAL INDIAN AGENCY,

April 28, 1848.

SIR: * * As I anticipated, when calling your attention to the massacre of the Indians (Wichitas) by Captain Highsmith's company, on the 10th instant, those Indians have already commenced a system of retaliation, by killing three surveyors, on the Trinity river, and it is impossible to say how long before we can again stop the effusion of blood on this frontier.

During my absence from this post, at my request (as I

expected many Indians to visit it), Mr. C. E. Barnard assisted the interpreter, Jim Shaw, in holding talks with the Indians. I herewith transmit for your information, such intelligence as was left for me, by said tribes, during my absence. * *

I have the honor to be, very respectfully,
Your obedient servant,
ROBERT S. NEIGHBORS,
Special Indian Agent.

To Colonel W. MEDILL,
Commissioner Indian Affairs,
Washington, D. C.

[Letter transmitted.]

SIR: In compliance with your request, to "assist the interpreter in holding talks, with whatever Indians visited this post, in your absence," I have obtained the following information: * *

Sunday eve (16th). This evening, by the arrival of Mr. Rolfe, from Captain Johnston's station, I have received the following information, viz: that, on the 9th inst. three surveyors, engaged in running the line of Peters' Colony, were killed and scalped, by some Indians, supposed to be Wichitas; they were found, by the balance of the party, who had just returned from the settlements, having been absent two days. It is supposed that the act was committed by the Wichitas, out of revenge for the killing of their people by Highsmith's company. * *

Yours respectfully,
C. E. BARNARD.

Major R. S. NEIGHBORS.

No. 128. Extract from a Report of R. S. Neighbors, Special Indian Agent, on file in the Indian Office, in-

dorsed O. I. A., Texas, N. 64. Ex. Doc. No. 1, 30 Cong., 2d sess., p. 591.

U. STATES SPECIAL AGENCY, *June 15th*, 1848.

SIR: * * The Wichitas still hold themselves aloof from our councils and occupy a very doubtful and threatening position since their people were killed by Capt. Highsmith's company. I am informed, by the friendly Indians, that they are making preparations to attack our frontier, as soon as their corn is harvested. I have not been able to see them, and am at a loss what course to pursue to pacify them, unless instructed by the Comr. what satisfaction to offer them. I would respectfully call the attention of the Commissioner to the propriety of giving the proper instructions, at as early a day as practicable, as that difficulty might be adjusted, without bloodshed, if the proper correction was applied in time. I learn from the Keechies and Wacoes, who have been for some days at this place, that both the Wichitas and Caddoes intend to commence depredations on our frontier settlers, unless satisfaction is given for the killing of their people by the Rangers. * *

Very respectfully, your obt. servt.,

ROBT. S. NEIGHBORS,
U. S. Special Ind. Agent.

To Col. W. MEDILL,
Comr. of Ind. Affairs,
Washington, D. C.

No. 129. Extract from Report of Special Indian Agent, accompanying the Report of the Commissioner of Indian Affairs for 1848, page 593.

UNITED STATES SPECIAL INDIAN AGENCY,

August 10, 1848.

SIR: Since the date of my last report, there has been no movement worthy of notice, among our border tribes of Indians, until about the 1st instant, when a small party, supposed to be Wichitas, Wacoes and some of the upper Comanches, made a descent on our frontier, visiting the stations of Captains Highsmith and Crump, where they succeeded in stealing, from the former company, thirty, and the latter, twenty horses, and made a nasty retreat beyond the mountains. About the same time two of Captain McCulloch's company were attacked, a short distance from their camp; but they succeeded in gaining the timber, and, after a short engagement, the Indians retreated, after having, as is supposed, two of their warriors killed. * *

The Wichitas continually threaten to retaliate on Captain Highsmith's company, for killing a portion of their tribe last spring, and I presume that to be the cause of the present hostile movements, as they have not approached our settlements. * *

Very respectfully, your obedient servant,

ROBERT S. NEIGHBORS.

Colonel W. MEDILL,
Commissioner of Indian Affairs,
Washington, D. C.

No. 130. Extract from report of Indian Agent, now on file in the Indian Office, indorsed O. I. A. Texas, N. 68. Rep. 1848, p. 539.

U. STATES SPECIAL IND. AGENCY,

Aug. 10, 1848.

SIR: * * The Wichitas continually threaten to retaliate on Captain Highsmith's company, for killing a

portion of their tribe last spring, and I presume that be the cause of the present hostile movements, as th have not approached our settlements. * *

Very Respectfully, your obedient servant,

ROBT. S. NEIGHBORS.

COL. W. MEDILL,
Comr. of Indian Affairs,
Washington, D. C.

No. 131. Extract from Report of Special Indian Age on file in the Indian Office, indorsed O. I. A. Texas, N. House Ex. Doc. No. 1, 30 Cong., 2 Sess., 593.

U. STATES SPECIAL INDN. AGENCY,
TORREY'S TRADING POST, *September* 14, 1848.

SIR: * * I have not as yet been able to see any the Wichitas, but have sent them a talk, and shall proce to the upper Brassos to see them, in a few days. * *

On account of the many misunderstandings, growi out of the several attacks on the Indians, I have deem it proper to require an escort for my visit to the Wichit and Col. Bell has furnished me with forty men, for t occasion.

Very respectfully, your obdt. servant,

ROBT. S. NEIGHBORS,
U. States Spl. Indian Agent.

To Col. W. MEDILL,
Comr. of Indn. Affairs,
Washington, D. C.

No. 132. Extract from Report of Special Indian Age enclosed in Texas, N. 93, on file in the Indian Offi Ex. Doc. No. 1, 31 Cong. 1 Sess., p. 963.

UNITED STATES SPECIAL INDN. AGENCY,
TORREY'S TRADING HOUSE, *March 7th*, 1849.

SIR: In accordance with your request of the 25th Feby., I submit the following table, showing the supposed number of Indians residing on our immediate borders. The estimate is made from the best information that could be obtained from the Indians, by frequent enquiry on the subject:

		No. of Souls.	No. of Warriors.
* *		*	*
Caddoes, Ionies, Anadahkas	Associates.....	1,400	280
Keechies.....		300	60
Witchitas, Wacos, Tahwaccarros	Associates.....	1,000	200
* *		*	*

These Indians range promiscuously across our frontier, from Red River to the Rio Grande, during the greater portion of the year, and seek shelter, during the winter, in the upper Cross Timbers of Texas, between the headwaters of the Colorado River and the Witchita mountains. * *

I have the honor to be, very respectfully,
Your obdt. servt.,

ROBT. S. NEIGHBORS,
U. States Special Indn. Agent.

To Maj. Genl. WM. J. WORTH,
San Antonio, Texas.

(Copy.)

No. 133. Extract from a statement of H. G. Catlett, accompanying the report of the Commissioner of Indian Affairs for 1849, page 968.

WASHINGTON, D. C., *May* 12, 18

SIR: * * I will now proceed to show the pos
&c., of those people in Texas. The Wichitas, To
and Keechies, numbering in all about 600 souls, live
together upon the Brazos head of the Trinity, and
the Big Wichita (the main southern branch of Red R
They are about 180 miles above the upper white s
ments on the last named river, and about two hun
miles above the settlements upon the Brazos. The
all of the Wichita tribe, and their proper homes a
the Wichita mountains, north of Red River and w
the United States Indian Territory. They live in
wams, and raise corn, pumpkins, &c., &c. The Cad
Annadarcoes and Ionies, although having each
separate chief, or head man, and living in separate vill
are associated together under the government of
principal chief. The Caddoes and Ionies live upo
Brazos and its northern tributaries, in the upper
Timbers, about 140 miles above the settlements on
River, 120 miles from those on the Trinity, and about
miles from those of the Brazos. The Annadarcoes
their village on the Brazos, about 40 miles above
settlements, but spend most of their time 100 miles w
the settlements, between the Brazos and Trinity ri
where they have been permitted to go, at their plea
in violation of the laws of the state. * *

A law of Texas, passed 14 January, 1843, provide
the establishment of a line of trading posts, which
intended to mark the temporary line between the w
and the Indians. The points designated were as foll

No. 1. On or near the south fork of the Trinity, s
where between the upper and lower Cross Timbers.

No. 2. At or near the Comanche Peak.

No. 3. At or near the old San Saba post or missio

No. 4. At or near the Porto Vanders.

No. 5. At or near the junction of the Moras and Rio Grande.

The same law provides that no trader shall furnish any warlike stores to the Indians. It is also forbidden for Indians to come into the settlements, or below the line established. * *

I have the honor to be, very respectfully,

Your obedient servant,

H. G. CATLETT,

Late Assistant Quartermaster U. S. Army,
stationed upon the northern frontier of Texas.

Hon. W. MEDILL,
Commissioner of Indian Affairs,
Washington, D. C.

No. 134. Extract from Report of Indian Agent, accompanying the Report of the Commissioner of Indian Affairs for 1849, page 1130.

CHICKASAW AGENCY, *August* 29, 1849.

SIR: * * This year several of the Keechies, Witchetaws, Tonquawas and Pah-ah-hu-ka, the principal chief of the Comanches, have visited me. The Keechies, or a number of their tribe, are very anxious to settle on the False Washita river, in the Chickasaw district, but the Chickasaws are opposed to it. The Witchetaws have been for some time living in the western part of the district, and the Chickasaws would be very much pleased for them to move off. Their visit to me is, I think, only a begging trip. They never bring any robes, or skins, to sell.

The Witchetaws and Caddoes have had some difficulties this spring. The Witchetaws stole several horses from the Caddoes, and the Caddoes went to the camp of the Witchetaws and requested them to give them up; the Witchetaws positively refused, and the Caddoes, with Jim Ned, part Delaware, and some few Boluxi Indians, drove off a number of the Witchetaws' horses. The Witchetaws saw and followed them, and, after going a mile or two, the Caddoes were overtaken and fired on by the Witchetaws. The Caddoes returned the fire, and, during the fight, the Caddoes lost two men killed, and one wounded; the Witchetaws lost 10 or 12 killed and wounded. So soon as I heard of the difficulty, I sent for both parties; several of the Caddoes, with their chief, came in, and three or four Witchetaws, with a second chief, came in. Col. D. S. Miles, United States Army, commanding Fort Washita, and myself talked to them and they agreed to be friendly for thirty days. At the end of that time, both tribes were to meet at the Chickasaw Agency, to have a council, which was to have been on the 27th of July last; but, on account of the high water, neither tribe came, and I have not seen them since. The greater part, or a number, of each of those tribes are living in the western part of the Chickasaw district. The Keechies are also opposed to the Witchetaws. They say that the Witchetaws are continually committing depredations upon the citizens of Texas, and it gives them (the Keechies) great uneasiness, thinking that the Texans might suppose that they were also engaged in stealing horses from them. These people I have no control over; but I thought it my duty to put a stop to their stealing and killing each other, if I could by council.

If they were to fight for a month I would have no means to put a stop to it.

Very respectfully, your most obedient servant,

A. M. M. UPSHAW,

United States Indian Agent, for the Chickasaws.

Colonel JOHN DRENNEN,

Acting Superintendent, Western Territory, &c.

No. 135. Extract from Report of Acting Special Indian Agent, on file in the Indian Office, indorsed O. I. A. Texas, R. 622. Sen. Ex. Doc. No. 1, 31 Cong., 2 Sess., p. 145.

AUSTIN, *Nov.* 2, 1850.

SIR: * * The Wichitahs, Tonkaways, and Keechies I did not see. They are, as I am informed, somewhere on Red River, and have formed a general combination for the purposes of plunder. It is this combination that does most of the horse stealing along the frontier. I do not expect them at the council, consider them beyond my control, and refer them to the government as a set of rascals who ought to be exterminated. * *

Very respectfully, your obt. svt.,

JNO. H. ROLLINS,

Acting as Special Agent for U. S. for Texas Indians.

To L. LEA, Esq.,

Com. Indian Affairs,

Washington City.

No. 136. Extract from statement of C. S. Todd, accompanying the Report of the Commissioner of Indian Affairs for 1851.

SAN ANTONIO, *March* 25, 1851.

SIR: I have the honor to enclose herewith a copy of a letter addressed to me by Judge Rollins, one of the special Indian agents in Texas. As it contains many interesting details and views, in relation to Indian affairs on this frontier, I have deemed it a duty to transmit it for the information of the department. The line, to which he alludes as having been agreed to by General Houston, in a council with the Indians, in 1843, and which, though not ratified by the congress of the republic of Texas, was so far adopted as to be made the basis of a chain of trading posts, had the effect to preserve peace with the Indians for several years. * *

I have the honor to be, with great respect,

Your obedient servant,

C. S. TODD.

Hon. L. LEA,

Commissioner Indian Affairs,

Washington, D. C.

No. 137. Extract from Report of Special Indian Agent, on file in the Indian Office, indorsed Texas, S. 694. Rep. 1851, p. 525.

To the Hon. L. LEA,

Commissioner of Indian Affairs,

Washington City, D. C.

SIR: * * The Wichitas were represented to me as a small tribe, numbering about one hundred. They, together with about eighty warriors from the Caddoes, Wacoes and Keechies (including about two-thirds of the latter tribe) with a small proportion of women and children, left Texas, and are now inhabiting the Washita mountains, north of Red River. * *

Respectfully submitted.

JESSE STEM,

Special Agent for the Indians of Texas.

No. 138. Extract from report of Special Indian Agent, now on file in the Indian Office, indorsed Texas, S. 214. Sen. Ex. Doc. No. 1, 32 Cong., 2 Sess., p. 433.

FORT GRAHAM, TEXAS, *Oct.* 8, 1852.

SIR: * * Under date of 12 June last, I communicated the fact that the Wichitas had been in the habit of visiting the frontiers of Texas, in small parties, and committing occasional depredations on her citizens, and, although they are perhaps not now strictly within the jurisdiction of Texas, I conceived it to be my duty to make an effort to arrest these practices, and establish some understanding with them, more especially as they have been parties to treaties with the government heretofore made within the limits of this state, and, so far as I know, are not under the charge of any other officer, or agent of the government. I accordingly dispatched a messenger (a chief of of the Wacoes) to their villages in the Wichita mountains, with some tobacco, and a talk to them upon the subject of their depredations, and a demand of such stolen property as they had in their possession. Soon afterwards, and while I was out in the Indian country, another party of this tribe robbed the train of W. Mackay of eight horses and mules. I thereupon secured a small escort, under command of Lt. Beall, of 5th Inf., and started after my messenger, intending to visit the Wichitas in person. We encountered a succession of rains and high waters, which so embarrassed and delayed us that, after swimming several streams, we were finally stopped by Red River within forty-five miles of the Wichita village; and, being too nearly out of provisions to await the subsidence of the stream, were compelled to return.

My messenger brought back eight stolen horses, which were given up by the Wichitas, and reported that the

chief of that tribe expressed the determination to put a stop to these aggressions of his people.

Besides these, I recovered four government horses from other Indian tribes, while on this expedition.

Lt. Beall afterwards, in the month of August, while out in search of Captain Marcy and his command (then reported to have been massacred by the Comanches), visited the Wichita villages, and held a talk with them. They then delivered up six more horses and mules, and, so far as I know, have committed no outrage on this frontier, since the robbery of Mackay's train.

I have the honor to be, very respectfully,
Your obt. servt.,

JESSE STEM,
One of the Spl. Agts. for Indians of Texas.

No. 139. Extract from Report of Special Indian Agent, accompanying the Report of the Commissioner of Indian Affairs for 1854, page 158.

SAN ANTONIO, TEXAS, *September* 16, 1854.

SIR: * * I would call the attention of the department to the serious depredations, committed by Indians residing east of Red river in the United States Indian reserve. There now reside on our border, in the Choctaw and Chickasaw reserve, the Wichitas, Wacoes, Tahwacconas, Keechies, and small bands of Ionies, and a considerable band of Kickapoos. They have, from time to time, crossed into Texas, and have, during the year, stolen large numbers of horses and committed other serious depredations on our citizens. * *

Your obedient servant,

ROBT. S. NEIGHBORS,
United States Special Indian Agent, &c.

HON. GEO. W. MANYPENNY,
Commissioner Indian Affairs,
Washington, D. C.

140. Report of Indian Agent accompanying Report of Commissioner for 1854.

FORT BELKNAP, TEXAS, *September* 20, 1854.

SIR: * * The Wichitas I have not met during the year; in fact they may be considered in a state of open hostility with the people on this portion of the frontier. They commit depredations by stealing horses, from time to time, as opportunities offer and prospects of escape will justify. * *

I have the honor to be, very respectfully,
Your obedient servant,

G. H. HILL,
Special Agent, Texas Indians.

R. S. NEIGHBORS, Esq.
Special and Supervising Agent, &c.,
San Antonio, Texas.

No. 141. Report of Commissioner for 1856, page 15.

DEPARTMENT OF THE INTERIOR,
OFFICE INDIAN AFFAIRS, *November*, 22, 1856.

SIR: * * The flattering success in Texas gives promise that, by a similar policy, the Southern Comanches, Wichetaws and other wandering bands, near the northern frontier of that state, may be successfully colonized on the western end of the Choctaw country, for which provision was made, by the treaty of 1855 between the United States and the Choctaws and Chickasaws. * *

Very respectfully, your obedient servant,

GEO. W. MANYPENNY,
Commissioner.

Hon. R. MCCLELLAND,
Secretary of the Interior.

No. 142. Extract from a report of Special Indian Agent, now on file in the Indian Office, indorsed Texas, N. 210.

BRAZOS AGENCY, TEXAS, *Decr. 27th*, 1856

SIR: * * On the 26th inst., we were visited by ten camps of Wichita Indians, who came in for the purpose of expressing their sincere friendship for the Indians of the reserve. They show a strong desire to settle here and come under the rules and regulations of this agency. * *

Your obdt. servant,

S. P. Ross,
Spel. Agent Tex. Indians.

To Maj. R. S. NEIGHBORS,
Supervising Agent Texas Indians.

No. 143. Report Commissioner 1858, page 12.

DEPARTMENT OF THE INTERIOR,
OFFICE INDIAN AFFAIRS,
November 6, 1858.

SIR: * * I regret to state that no progress has yet been made, in carrying out the provision in the act of March 3, 1857, for "collecting and establishing the Southern Comanches, Wichitas, and certain other bands of Indians, on reservations to be located South of the Arkansas river, and west of the ninety-eighth degree of longitude." Those Indians are wild and lawless, in their disposition and habits, and cannot be brought together without danger of difficulties occurring among themselves, or of their committing forages upon the western Choctaws and Chickasaws, with whom they will be brought into close proximity, and whom we are bound by treaty stipulations to protect from such casualties. A strong military force, in the region of country where it is intended to settle them, is absolutely necessary, to hold in check and control them, and

to afford the requisite protection to the agent appointed to take them in charge. * *

Very respectfully, your obedient servant,

CHARLES E. MIX,
Commissioner.

Hon. JACOB THOMPSON,
Secretary of the Interior.

No. 144. Extract from a report of Supervising Agent, now on file in the Indian Office, indorsed, Texas, N. 567.

SAN ANTONIO, TEXAS,
December 19th, 1858.

SIR: I have the honor to acknowledge the receipt of your letter of the 7th, in relation to the letter of Col. Elias Rector, in regard to the Wichita Indians; and, in answer thereto, would state that the information received by him, through F. P. Page, is false, from beginning to end, as no such emissaries as those spoken of have ever been sent by me to the Wichitas; on the contrary, the Wichitas have, on several occasions, within the last three years, been refused permission by me to emigrate to Texas, and settle on the reserve at Brazos Agency, and in no instance have either myself or the special agents under my control interfered, either directly or indirectly, with the Indians in the Southern Superintend'cy, except to report some cases of horse stealing to the commanding officer at Fort Arbuckle, or to Col. Cooper, Agent of the Choctaws and Chickasaws. * *

Very respectfully, your obdt. svt.,

ROBT. S. NEIGHBORS,
Supervising Agent, Texas Indians.

Hon. J. W. DENVER,
Commr. Indian Affairs, Washington, D. C.

No. 145. Extract from an order of Acting Commissio
of Indian Affairs, now on file in the Indian Office
Wichita Case No. 81. Sen. Ex. Doc. No. 2, 36 Co
1 Sess., p. 632.

DEPARTMENT OF THE INTERIOR,
OFFICE INDIAN AFFAIRS, *March 30th*, 185

ELIAS RECTOR, Esq.,
Superintendent, &c.

SIR: * * So soon as it may be practicable and
for the Wichitas to remove to their new location, you
require them to go there, giving them to understand
it is to be their permanent home, and that none of th
must leave their reservation without the permissio
the agent. * *

Very respectfully, your obt. servt.,

CHAS. E. MIX,
Acting Commissione

No. 146. Extract from a report of Superintend
Indian Affairs, on file in the Indian Office, indo
South[n] Sup., R. 44. Rep. 1859, p. 677.

FORT ARBUCKLE,
CHICKASAW COUNTRY, 2*d July*, 185

SIR: * * Of the country on the Canadian, selec
by the Wichitas and Kichais, I obtained accurate infor
tion from Se-kit-tu-ma-qua, my Delaware interpreter,
is thoroughly acquainted with it; and I, therefore, did
deem it necessary to examine it in person. The Wich
and Kichais all desire to settle there; and, as they h
resided in this region from a time beyond any o
memory, and have a better claim to it than any ot

tribe, they ought, I think, to have the privilege of selecting their home. *

I have the honor to be, sir, very respectfully,
Your obdient servant,

ELIAS RECTOR,
Supt. Ind. Aff. Ft. J.

Hon. A. B. GREENWOOD,
Commissioner of Indian Affairs.

No. 147. Report of Superintendent of Indian Affairs accompanying Report of Commissioner for 1859, page 165.

OFFICE SOUTHERN SUPERINTENDENCY,
FORT SMITH, *September* 20, 1859.

SIR: * * In pursuance of instructions from your office, and as I have already reported, I selected in the month of June last, reserves on the Fausse Wachita river, near the old Kichai village, and about forty miles northeast of the eastern extremity of the Wichita mountains, in the river valley, on the south side, for the Comanches, and other Indians from Texas; and on the north side, between the river and Sugar Tree Creek, for the Delawares and Caddoes, heretofore affiliated with the Wichitas or Tawai-hash; and for the latter and the bands of Kechais, affiliated with them, I selected a reserve on the Canadian, some twenty-five miles west of those on the Fausse Wachita. I made those selections, after having explored the country adjacent to the Wichita mountains, and satisfied myself that that region was not such as it had been represented to be, but was unfitted for a home for any people. * *

I have the honor to be, very respectfully,
Your obedient servant,

ELIAS RECTOR,
Supt. Indian Affairs.

Hon. A. B. GREENWOOD,
Com. Indian Affairs, Washington City, D. C.

No. 148. Report of Commissioner for 1890, p. XXXI.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *September* 5, 1890.

The Secretary of the Interior:

SIR: * * The Wichita Reservation, in Indian Territory, is defined in an unratified agreement, made October 19, 1872, and is located within the limits of the reservation of the Cheyenne and Arapaho Indians, established by Executive order of August 10, 1869; but there is no evidence that they hold it by any higher title than that contained in said unratified agreement, although they claim to have resided thereon for many years prior to said order. A small tract, partly within this reservation, was selected for them in 1859, by Superintendent Rector.

Very respectfully,

T. J. MORGAN,
Commissioner.

No. 149. Report of agent accompanying Report of Commissioner for 1868, page 287.

WICHITA AGENCY, INDIAN TERRITORY,
October 1, 1868.

SIR: * * The work of building fences and putting in crops commenced with commendable energy and zeal, on the part of the Shawnees and Delawares, they using the ploughs with very little assistance and instruction; the Wichitas and some of the other tribes refusing to make any effort in that direction, saying they could not think of making a squaw of themselves by working. The

women and children, however, managed to plant and cultivate an amount of ground beyond my expectation. * *

I am, very respectfully, your obedient servant,

HENRY SHANKLIN,
United States Indian Agent.

Colonel S. N. ROBINSON,
Superintendent Indian Affairs,
Southern Superintendency, Creek Agency, C. N.

No. 150. Report of Agent accompanying Report of Commissioner 1877, p. 112.

OFFICE WICHITA AGENCY, INDIAN TERRITORY,
Eighth month 20, 1877.

* * * * * * *

A recent enumeration of the different tribes shows that there are 1,295 Indians attached to this agency, divided into bands, as follows:

Caddoes, including Delawares and Ionies	643
Wichitas	210
Towaconies	154
Wacoes	45
Keechies	90
Comanches	153
Total	1,295

* * * * * * *

The Wichitas, Wacoes, and Towaconies are virtually one people, speaking the same language, the names Wacoes and Towaconies being given to the descendants of two bands of the Wichitas, who, about one hundred years ago, left the main tribe on the Neosho River in Kansas, one taking up a residence on the Arkansas River, near the

present town of Wichita, and the other pushing
Texas. * *

Respectfully submitted.

A. C. WILLIAMS
United States Indian Ag

The COMMISSIONER OF INDIAN AFFAIRS.

No. 151. Extract from a report of Special Indian
accompanying the Report of the Commissioner of I
Affairs for 1871, page 478.

WICHITA AGENCY, INDIAN TERRITORY,
Eighth month 28, 1

DEAR FRIEND: * * In presenting this subject,
refer to the fact that, in a treaty held with the Wi
and other affiliated bands, at or near Fort Arbuck
Brazos Agency, on or about 1858–'59, the title
Wichitas was recognized to the land on which the
reside, and extending from the Red River to the
dian. * * *

Very respectfully,

JONATHAN RICHARDS,
Special United States Indian Agent f
the Wichitas and other affiliating ba

ENOCH HOAG,
Superintendent Indian Affairs,
Lawrence, Kansas.

No. 152. Report of Commissioner for 1872, page

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS, *November* 1, 1

SIR: * * The Indian title to lands, within the
of the States and Territories of the United States,

settled to be the right of occupancy alone, except in special instances when perhaps a title of a higher nature has been vested by statute, or by treaty provision.

In the early history of the Western World the principle was established, as between European nations, that discovery conferred sovereignty upon the government under whose authority the discovery was made; and to the discoverers was accorded the exclusive right of acquiring the soil from the natives. The Indians in possession were conceded to be the rightful occupants, with a just and perfect claim to retain possession and enjoy the use, until they should be disposed to part with it; but it was also well established that they could only part with the soil to those who claimed sovereignty, by right of discovery. Thus far were the rights of the natives, as original owners of the soil, restricted; they could not sell, or convey, to any other power, or to the citizens of any other power.

By the treaty of peace with Great Britain, in 1783, the United States acquired all the rights in respect to the soil, which had previously been in that nation.

By treaty with France, in 1803, known as the treaty of Paris, by which France ceded to the United States territory previously ceded to France by Spain, it was stipulated in the sixth article thereof:

"The United States promise to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians, until, by mutual consent of the United States and the said tribes or nations, other suitable articles shall have been agreed upon. * *"

Page 101. The Wichitas and other affiliated bands having, for a long time, resided within the limits of the tract known as the leased district, in the Indian Territory, without any defined reservation set apart for their occupancy, and having, also, a claim good or bad to a large

tract of country, an agreement was made by the Commissioner of Indian Affairs, with a duly authorized delegation of said Indians, by which the following described tract of land is set apart for them, viz: Commencing at a point in the middle of the main channel of the Washita River, where the ninety-eighth meridian of west longitude crosses the same; thence up the middle of the main channel of said river to the line of 98° 40′, west longitude; thence, on said line of 98° 40′, due north, to the middle of the main channel of the main Canadian River; thence, down the middle of the said main Canadian River, to where it crosses the ninety-eighth meridian; thence, due north, to the place of beginning.

In consideration for said tract of land, the Indians cede and relinquish to the United States all their right, title, interest, or claim, of any nature whatsoever, to any lands in Texas, Louisiana, the Indian Territory, or elsewhere within the limits of the United States.

I have the honor to be, sir, very respectfully,
Your obedient servant,
FRANCIS A. WALKER,
Commissioner.

Hon. C. DELANO,
Secretary of the Interior.

No. 153. Report of Commissioner for 1872, page 43.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS, *November* 1, 1872.

SIR: * * Wichitas, &c. The Wichitas and other affiliated bands of Keechies, Wacoes, Towoccaroes, Caddoes, Ionies and Delawares number 1,250, divided, approximately, as follows: Wichitas, 299; Keechies, 126; Wacoes,

140; Towocarroes, 127; Caddoes, 392; Ionies, 85; Delawares, 81. These Indians, fragments of once important tribes, originally belonging in Louisiana, Texas, Kansas, and the Indian Territory, were all, excepting the Wichitas and Delawares, removed by the government from Texas, in 1859, to the "leased district," then belonging to the Choctaws and Chickasaws, where they have since resided, at a point on the Washita River near old Fort Cobb. They have no treaty relations with the government, nor have they any defined reservation. * *

I have the honor to be, sir, very respectfully,
Your obedient servant,

FRANCIS A. WALKER,
Commissioner.

Hon. C. DELANO,
Secretary of the Interior.

No. 154. Report of Captain Henry E. Alvord, commissioner to the Kiowas, Comanches and other tribes, in the western part of the Indian Territory. Accompanying Report of Commissioner, 1872, p. 134.

WASHINGTON, D. C., *October* 10, 1872.

GENERAL: * * The Wichita Agency has been established on the north bank of the (False) Washita River, just opposite what is known as Eureka Valley. It is on the direct road from Fort Sill to the Cheyenne agency, thirty-five miles from the former, and forty from the latter. There are properly belonging to this agency about twelve hundred Indians, viz: Caddoes, 392; Ionies, 85; Wichitas, 299; Wacoes, 140; Keechies, 126; Towoccaroes, 127. The Caddoes and Ionies are virtually one people and should be so regarded, and the Wacoes, Keechies and

Towoccaroes, originally from Texas, have long been affiliated with the Wichitas. The proper designation for this agency is therefore "The Caddoes, Wichitas and Affiliated Bands." There are also now attached to this agency nearly three hundred of the Pineteghka or southern band of Comanches.

Very respectfully, your obedient servant,

HENRY E. ALVORD.

The Hon. COMMISSIONER OF INDIAN AFFAIRS,
Department of the Interior, Washington.

No. 155. Report of Commissioner for 1870, page 264.

OFFICE OF KIOWA AND COMANCHE AGENCY,
FORT SILL, INDIAN TERRITORY,
8th month 12th, 1870.

* * *

There has been no opportunity to count the Indians for several months. I shall therefore take the last census that was made for issuing rations, which was about one year ago, with the corrections as we have been able to make since: Kiowas, 1,896; Apaches, 300; Comanches, 2,742; Wichitas, 260; Caddoes, 500; Delawares, 95; Keechies, 100; Towaconies, 140; Wacoes, 125; Hie-en-eyes, 100.

* * * * * *

Respectfully,

LAURIE TATUM,
United States Indian Agent.

Friend ENOCH HOAG,
Superintendent Indian Affairs.

No. 156. Letter of Wm. Clark and A. Chouteau, to the Secretary of War.

ST. LOUIS, *Sept. the 6th*, 1818.

SIR: We have the honor herewith to transmit the treaty concluded with the Quawpaws on the 24th ult., by which it will be seen that a large tract of valuable country (which has at all times heretofore been considered their property, as well by the former governments as by the Osages, their neighbors) has been ceded to the United States, embracing all the white settlements in that quarter and extending far to the west of them. *

We have the honor to be, very respectfully, sir,

Your obdt. huml. serts,

WM. CLARK.
AUG. CHOUTEAU.

No. 157. Report of Agent accompanying Report of Commissioner for 1872.

WICHITA AGENCY, INDIAN TERRITORY,
Ninth month 1, 1872.

RESPECTED FRIEND: * * The census of the Indians on the reservation is as follows, to wit: Caddoes, 392; Wichitas, 299; Wacoes, 140; Tawacanies, 127; Keechies, 126; Delawares, 81; Ionies, 85; Penetethka Comanches, 285; total, 1,535. * *

Very respectfully,

JONA. RICHARDS,
United States Indian Agent.

ENOCH HOAG,
Superintendent of Indian Affairs,
Lawrence, Kansas.

No. 158. Report of Agent accompanying Report of Commissioner for 1873, 224.

WICHITA AGENCY, INDIAN TERRITORY,
Ninth month 1, 1873

DEAR FRIEND: * * From a census, recently taken with great care and much labor, in which service I had the assistance of A. J. Standing, I find the Indians belong to the reservation number as follows, to wit: Caddoes, 401; Wichitas, 300; Wacoes, 140; Tawacanies, 125; Keechies, 106; Delawares, 61; Ionies, 50; and Penetethka Comanches, 345. Total, 1,528. * *

Very respectfully,

JONA. RICHARDS,
United States Indian Agent.

ENOCH HOAG,
Superintendent Indian Affairs,
Lawrence, Kansas.

No. 159. Report of Agent accompanying Report of Commissioner for 1874, page 237.

WICHITA AGENCY, INDIAN TERRITORY,
Ninth month 1, 1874.

ENOCH HOAG,
Superintendent Indian Affairs,
Lawrence, Kansas.

* * * * * *

The number of Indians belonging to this agency varies but little from my former report, except in one or two of the bands. It is as follows, to wit: Caddoes, 521; Wich-

itas, 300; Wacoes, 140; Tawacanies, 125; Keechies, 106; Penetethka Comanches, 345; Pawnees, 360; total, 1,897.

* *

Very respectfully,

JONA. RICHARDS,
United States Indian Agent.

No. 160. Report of Commissioner for 1875, page 99.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *November* 1, 1875.

SIR: * * The Wichitas, numbering 228, the Wacoes, 66, Tawacanies, 102, and the Keechies, 90, are located, with the Caddoes, in the Wichita reservation, in the Indian Territory; are in much the same condition as reported last year. * *

I am, sir, very respectfully,
Your obedient servant,

EDW. P. SMITH,
Commissioner.

Hon. SECRETARY OF THE INTERIOR.

No. 161. Report of Agent accompanying Report of Commissioner for 1876, p. 64.

WICHITA AGENCY, INDIAN TERRITORY,
ANADARKO, *Eighth month* 21, 1876.

* * * * * *

A careful enumeration of all the bands, belonging to the agency, has recently been made, showing the whole number of Indians to be 1,220, divided into bands, as follows:

Caddoes, including Delawares and Iowas (Ionies?)	580
Comanches, two bands	168
Wacoes	70
Wichitas	217
Tawacanies	100
Keechies	85

Total number of Indians on reservation is 1,220, of which number there are 385 men, 459 women, 208 boys and 168 girls. * *

Of the several bands of Wacoes, Wichitas and Tawacanies there are 387 persons, in which bands the general characteristics are similar, speaking the same language and, in various particulars, acting as one people. *

Among the various bands five different languages are spoken. The Caddoes and Delawares each have a language of their own; the Comanches have theirs; the Wacoes, Wichitas and Tawacanies have the Wichita language in common, while the Keechies have theirs, yet unlike any other.

Except the Caddoes, Delawares and Wacoes, these bands are now occupying the lands of their fathers, and, being the original settlers, they feel that they are entitled to permanent homes. The reservation now occupied by them, bounded north by the main Canadian River, east by the ninety-eighth degree of west longitude, south by the Washita River and west by range 14, has been defined and surveyed, but has never yet been confirmed to them, and I would suggest that early measures be adopted toward the end that the affiliated bands be made secure in the homes they are now so desirous to secure and establish. * *

I am, very respectfully,

A. C. WILLIAMS,
United States Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

No. 162. Report of Agent accompanying Report of Commr. for 1879, page 62.

KIOWA, COMANCHE AND WICHITA AGENCY,
ANADARKO, IND. TER., *August* 30, 1879.

SIR: * * The following table will show the number of Indians attached to the consolidated agency:

Kiowas	1,138
Comanches	1,393
Apaches	315
Wichitas	209
Wacoes	49
Towaconies	155
Kechies	75
Caddoes	543
Delawares	81
Comanches (of Wichita)	159
Total	4,117

* *

I have the honor to be, very respectfully,
Your obedient servant,

P. B. HUNT,
United States Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

No. 163. Report of Agent, enclosed in Report of Commissioner, 1880, page 71.

KIOWA, COMANCHE AND WICHITA AGENCY,
ANADARKO, IND. TER., *September* 1, 1880.

SIR: * * The following will show the number of Indians attached to this agency, according to the census just taken:

	No. of Men.	No. of Women.	No. of Boys.	No. of Girls.	Tota
Kiowas	291	381	229	223	1,1
Comanches	338	567	245	249	1,3
Apaches	81	90	89	74	3
Wichitas	57	66	38	31	1
Wacoes	14	18	8	7	
Towaconies	39	56	28	22	1
Keechies	24	25	15	10	
Caddoes	139	156	123	120	
Delawares	15	24	14	25	
Penetethkas (Comanches) with affiliated bands	42	60	35	18	1
At agency	1,040	1,443	824	779	4,0
Absent (at Carlisle)	.....	.....	28*	9*	
Total present and absent	1,040	1,443	852	788	4,1

* * * * * *

It may be seen, by an examination of the reports fo several years past, that there has been no material chang in the numbers of these tribes, or that, certainly, there has been no increase. I am not able to state with certainty what may be the cause of this, but think I can indicate pretty accurately what is one of the chief reasons. As it is well known that many infants die, who are never reported to the physician or to the agent, and as the births are not always reported, and there are no means of ascertaining this number, there can, of course, be no comparison made the one with the other; but it is thought, if both were known, a frightful mortality would be shown of infants and children under four years old. Very many of each of the tribes are seriously affected with venereal

*The absentees are Kiowas 11 boys and 4 girls; Comanches, 13 boys and 1 girl; Wichitas, 3 boys and 3 girls; Keechies, 1 boy; Towaconies, 1 girl.

disease—that curse which has borne so heavily on the red man for generations; and the children of such come into the world, so frail, so tainted by the foul disease, that it is thought few live to adult age; indeed only those with the very strongest constitutions do so. I regret to have to state that the habits of the young women are such, especially those of some of the tribes, that the prospect of a better future for these people, in this particular, looks gloomy indeed.

* * * * * *

Very respectfully, your obedient servant,

P. B. HUNT,
United States Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

No. 164. Report of Agent accompanying Rep. Commr. for 1881, page 77.

KIOWA, COMANCHE AND WICHITA AGENCY,
ANADARKO, IND. T., *September* 1, 1881.

SIR: * * The following table will show the number of Indians belonging to this agency:

Name of tribe or band.	No. of men.	No. of women.	No. of boys.	No. of girls.
Kiowa	277	381	251	236
Comanche	336	555	244	261
Apache	77	90	88	82
Wichita	59	59	45	43
Wacoe	16	18	9	6
Towaconie	37	55	29	30
Keechi	27	26	15	9
Caddo	151	151	127	123
Delaware	14	24	16	25
Penetethka (Comanche)	45	60	37	23
Total number	1,039	1,419	861	838
Absent at Carlisle			26	9
Kiowa			10	4
Comanche			12	1
Wichita			3	3
Keechi			1	
Towaconie				1

It will be seen that there are nine different tribes un my charge, the Penetethkas being one of the branche the great Comanche tribe of Indians. Some years ag portion of this family, about 170 in number, were p mitted to associate themselves with the Wichitas, Wac Towaconies, Keechies and Caddoes, and become of six affiliated bands, out of which was formed the Wic Agency. The Delawares, the remnant of that once pow ful tribe which figured so conspicuously in the early h tory of this country, although not a party to the agr ment between the United States government and affiliated bands, were permitted to enjoy its benefits, a having, in some way, become associated with the Caddo were formerly counted and reported with them, by agen Seven languages, only, are spoken, as the Wichit Wacoes, and Towaconies speak the same language, a are, indeed, one people, the Wacoes and Towacon being branches of the Wichita tribe. It is said th

about one hundred years ago, two bands left the main tribe (the Wichitas) on the Neosho River, in Kansas, one taking up its residence on the Arkansas River, near the present town of Wichita, Kans., and the other going to Texas; and to the descendants of these two bands the names of Wacoes and Towaconies were given. As, however, many members of each of these tribes speak the Comanche language, it has become, as it were, a court language among them. * *

Very respectfully,

P. B. HUNT,
United States Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

No. 165. Report of agent accompanying Report of Commissioner for 1888, page 96.

KIOWA, COMANCHE AND WICHITA AGENCY,
ANADARKO, IND. T., *August* 18, 1888.

SIR: * * The tribes residing on this reserve and under the control of this agency are as follows:

Tribes.	No.
Comanches	1,564
Kiowas	1,121
Caddoes	491
Apaches	348
Wichitas	165
Tehuacanoes	143
Delawares	89
Wacoes	64
Keechies	30
Children away at school	211
Total	4,226

* * * * * *

These tribes are all to-day in a prosperous, and
I may say, a happy condition. Some of them liv
houses; but the most of them live in grass lodges
in form and structure peculiar to the Wichitas.

I have the honor to be, sir,

Very respectfully, your obedient serva

E. E. Wh

Special Agent in C

The Commissioner of Indian Affairs.

No. 166. Report of Agent accompanying
Commr., 1889, p. 188.

Kiowa, Comanche and Wichita Agency,
Anadarko, Ind. T., *August* 27,

Sir: * * According to a very careful cen
completed, I find the following number of Indians
ing to the several tribes under the control of this
viz:

Tribes.	No.
Comanches	1,590
Kiowas	1,142
Apaches	349
Wichitas	164
Wacoes	29
Keechies	62
Towaconies	145
Caddos	517
Delawares	90
Total	4,088

This shows an increase of 73 Indians, "divide
the various tribes," for the fiscal year. I feel

that the census is as nearly correct as it can be made, as it has been taken with great care. * *

With perfect respect, I remain,

Your obedient servant,

W. D. MYERS,
Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

No. 167. Report of Agent accompanying Report of Commissioner for 1890, page 186.

KIOWA, COMANCHE AND WICHITA AGENCY,
ANADARKO, OKLAHOMA, *September* 16, 1890.

SIR: * * The census returns, according to enumeration of 1890, are as follows:

Tribes.	No.
Kiowas	1,140
Comanches	1,598
Apaches	326
Wichitas	174
Caddos	538
Towaconies	150
Keechies	66
Wacos	34
Delawares	95
Total	4,121
Number of deaths	186
Number of births	222

* * * * * *

In connection with liquor there has been little or no trouble. Among the Indians themselves there has been greater harmony than could be expected. There is, how-

ever, one matter which demands prompt and decisive attention from the department, and from higher power. Murder, pony-thieving, wife-beating and immorality of all kinds are consequent upon the present manner of making or breaking the marital bonds. * *

With sentiments of highest respect,

Your obedient servant,

CHAS. E. ADAMS,

United States Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

No. 168. Report of Agent accompanying Report of Commissioner for 1891, page 352.

KIOWA, COMANCHE AND WITCHITA AGENCY,

ANADARKO, OKLA., *August* 10, 1891.

SIR:

* * * * * * *

Population.

Kiowas	1,151
Comanches	1,624
Apaches	325
Wichitas	175
Caddoes	545
Towaconies	150
Delawares	95
Wacoes	35
Keechies	66
Total	4,166
Males	1,971
Females	2,195
Total	4,166

* * * * * * *

Your obedient servant,

CHAS. E. ADAMS,

United States Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

No. 169. Wichita population. The number of the Wichitas is not shown in any of the reports of the Commissioner of Indian Affairs from 1835 to 1842, inclusive. The numbers of the Caddoes and Pawnees are shown as follows:

		Caddoes.	Pawnees.
Report of 1835,	page 297	2,000	10,000
1836,	" 403	2,000	10,000
1837,	" 642	2,000	12,500
1842,	"	2,000	12,500
1843,	"	2,000	12,500
1844,	"	2,000	12,500
1845,	"	2,000	12,500

Report of Indian Agent, accompanying Report of Commissioner for 1849.

POPULATION.

Caddoes, Ionies, Anadahkas,	Associates	1,400	280
Keechies		300	60
Wichitas, Wacos, Tahwacanes,	Associates	1,000	200

Report of Commissioner, 1854, page 255.

POPULATION.

1854.	Residence.
Anadahkas, Caddoes and Ionies.....500	Texas.
Keechies, Wacoes and Tawaccarros....300	"
Wichitas.....950	"

Report of Commissioner for 1867, page 379.

Wichitas	364
Keechies	127
Wacoes	124
Tawacanas	143
Caddoes and Ionies	347

Report of Commissioner for 1868, page 353.

Wichitas	280
Keechies	123
Wacoes	135
Tawacanas	157
Caddoes and Ionies	480

Report of Commissioner for 1869, page 394.

Caddoes on the reservation	284
Wichitas and affiliated bands	700

Report of Commissioner for 1870, page 264.

Wichitas	260
Caddoes	500
Keechies	100
Delawares	95
Towacanos	140
Wacoes	125

Report of Commissioner for 1871, page 612.

Wichitas and affiliated bands	1,216

Report of Commissioner for 1872, page 254.

Caddoes	392
Wichitas	299
Wacoes	140
Towacanies	127
Keechies	126
Delawares	81
Ionies	85
Penetethka Comanches	285
Total	1,535

Report of Commissioner for 1873, page 234.

Caddoes, 401; Wichitas, 300; Wacoes, 140; Tawacanies, 125; Keechies, 106; Delawares, 61; Ionies, 50; Penetethka Comanches, 345; total, 1,528.

Report of Indian Agent, accompanying Report of Commissioner for 1874, page 237.

Caddoes, 521; Wichitas, 300; Wacoes, 140; Towacanies, 125; Keechies, 106; Penetethka Comanches, 345; Pawnees, 360; total, 1897.

Report of Commissioner for 1875, page 110; table.

Caddoes, 552; Wichitas, 228; Comanches, 165; Tawacanies, 102; Keechies, 90; Wacoes, 66.

Report of Indian Agent, accompanying Report of Commissioner for 1876, page 64.

Caddoes, including Delawares and Iowas (Ionies ?), 580; Comanches, two bands, 168; Wacoes, 70; Wichitas, 217; Keechies, 85; total number, 1,220.

Report of Indian Agent, accompanying Rep. of Comr. 1877, page 112.

Caddoes, including Delawares and Ionies, 643; Wichitas, 210; Towaconies, 154; Wacoes, 45; Keechies, 90; Comanches, 153; total, 1,295.

Report of Commissioner for 1878, page 286.

Wichita, 206; Waco, 65; Towaconie, 160; Keechie, 87; Caddo, (including Delaware) 652; Comanche, 165.

Report of Commissioner for 1879, page 232.

Wichita, 209; Waco, 49; Towaconie, 155; Keechie, 75; Caddo, 543; Delaware, 81.

Report of Commissioner for 1882, page 64.

WICHITAS.

Men	59
Women	59
Boys	45
Girls	43
At Carlisle,	
Boys	5
Girls	3
Total	214

Report of Commissioner for 1883, page 70.

WICHITAS.

Men, Women, Boys, Girls, At Carlisle, Boys, Girls,	216

Report of Commissioner for 1884, page 79.

WICHITAS.

Males	98
Females	111
Total	209

Report of Commissioner for 1885, page 83.

WICHITAS.

Males	92
Females	107
Total	199

Report of Commissioner for 1886, page 132.

WICHITAS.

Male	96
Females	91
Total	187

Report of Commissioner for 1887, page 81.

WICHITAS.

Males	98
Female	94
Total	192

WICHITA POPULATION.

Tabulated Statement.

1867	364
1868	280
1870	260
1872	299
1874	300
1875	228
1876	217
1877	210
1878	206
1879	209
1882	214
1883	216
1884	209
1885	199
1886	187
1887	192

No. 170. Extract from a Report of Indian Agent on file in the Indian Office, indorsed Wichita, R. 212.

WICHITA AGENCY, L. D., *April* 19, 1860.

SIR: By order of Supt. Rector, of the Southern Superintendency, your circular, dated Nov. 17, 1859, directing

that the proposition for surveying and alloting to them, in severalty, so much of their land as was necessary for their actual occupancy and cultivation, was submitted to the chiefs and head men of the several bands who compose this agency, in council, early in January last.

Having had the subject under consideration for over three months, and again having assembled in council, they request me, as their agent, to say:

That there are nine different bands and parts of bands now resident in this district, viz: Caddoes, Anahdahkos, Comanches, Tonkahuas, Ionies, Keechies, Witchitas, Wacos and Tahuacarros; of these, only three bands claim any right to speak in the premises, viz: Witchitas, Wacos and Tahuacarros. These three bands are composed of a people having the same habits and speaking the same language, and claim to have had the same origin.

They say that this country (by which they mean all that country lying between the Red River and the Canadian River from the mouth of the False Washita on River to a point due north of the same, on the Canadian, as its eastern boundary, and as far west as the west end of the Wichita mountains, is exclusively their own; that they have held it in possession, and cultivated as much of it as was necessary for their support, from time immemorial; that they used to be powerful, and kept intruders, such as Comanches and others, off of it; that they have, by long wars, become enfeebled, and have sought and obtained the favor and protection of the United States Government; that they do not think it would be just, in so powerful a government, to take and distribute their country to a people, who had warred upon them, without first paying for it; that in all the treaties which they have held with their Indian neighbors, whether civilized, or wild roving

bands of the prairies, this right has never been disputed.

* * * * *

Very respectfully, your obt. svt.,

S. A. BLAIN,
U. S. Agent for Wichitas and Others, L. D.

Hon. A. B. GREENWOOD,
Com. Indian Affairs, Washington, D. C.

No. 171. Negotiations relating to the district between the 98th and 100th meridians.

Extract from letter of July 11, 1854, from Choctaw Delegates to Commissioner of Indian Affairs.

* * * We shall, therefore, have to demand the immediate removal of the several bands of Texas and other Indians, who have settled within our limits; and if this demand be not complied with, we will remove them ourselves, using force if necessary. The Government must look to the consequences, whatever they may be. *Our country extends west to the headwaters of the Canadian, about the* 103*d degree of west longitude*, and we are prepared to maintain our rights to a boundary that far west by facts and evidence which cannot be disputed. In the compromise with Texas, in 1850, that portion of our country west of the 100th degree of west longitude was assigned to that State, in direct and palpable violation of our rights. We must demand to be re-possessed of this portion of our country; and if this is not done our people will take possession of it, and leave the Government to settle with Texas and the Indians upon it for such damages as they claim.

Letter of U. S. Agent for Choctaws.

WASHINGTON CITY, *April* 9, 1855.

GENTLEMEN: I am to-day in receipt of a letter from Geo rge W. Manypenny, Commissioner of Indian Affairs, instructing me to confer with the Choctaw delegation now in this city, for the purpose of ascertaining what arrangements, if any, can be made with them, having in view the adjustment of all differences between their tribe and the Chickasaw tribe of Indians, the Government of the United States, and the permanent settlement of the Wichita and other bands of Indians in the Choctaw country.

I respectfully request that you will furnish me, as early as practicable, with an answer in writing to the above interrogatories, in order that the same may be reported to the Commissioner of Indian Affairs.

Your friend,

DOUGLAS H. COOPER,
United States Agent for Choctaws.

To P. P. PITCHLYNN,
ISRAEL FOLSOM,
SAM'L GARLAND,
DICKSON W. LEWIS,
Choctaw Delegation, Washington City.

Reply of the Choctaw Delegates.

* * * Respecting the Wichia and other bands of Indians, who have intruded themselves within the limits of our country, we have to remark they are, as you know, a nuisance, and we had far rather be rid of them altogether. In our communication to the Acting Commissioner of Indian Affairs, of the 11th of July last, we demanded their removal, as we had a right to do; but we are not aware that any order has been given on the subject. We have had it in contemplation to renew this demand, and, if not

complied with, to remove them by force if necessary. We and our people have, however, as we have ever had, every disposition to comply with the policy and wishes of the Government; and, if it be an object of importance to it, to have these Indians accommodated with a home within the boundaries of our country, though such an arrangement would be greatly repugnant to our inclinations and feelings, we would consent to it on fair and reasonable terms, *if it can be made a part of a just and equitable adjustment of all the matters involved in* the existing controversy between the Choctaws and the Government; otherwise we could not take the serious responsibility of encountering the prejudices and opposition of our people to the measure.

Statement of the Chickasaw Delegates, April 14, 1855.

In regard to the third point, they have only to say that, in conjunction with the Choctaws, they are willing to enter into an arrangement with the United States Government for the permanent settlement of the Wichita and other bands of Indians in the Choctaw country, upon terms just, fair, and safe for both the Choctaws and Chickasaws.

Letter of April 21, 1855, from Secretary of Interior to Commissioner of Indian Affairs.

If you have any plan for the settlement of these difficulties, or if the Choctaws will submit a distinct offer, as the terms on which they will settle with the Chickasaws, and provide for the Witchitas and other Indians within the limits of the Choctaw country, the Department will give it prompt consideration, and with every disposition to award to them and the Chickasaws such degree of favor as may not be incompatible with the rights and interests of the United States.

Letter of April 26, 1855, from Commissioner of Indian Affairs to Indian Agent.

* * You will also ascertain upon what terms the Choctaws will arrange with the United States, for the use of their country west of 98° west longitude, for the Wichitas and such other bands of Indians as the Government may desire to settle permanently west of that degree of longitude, also upon what terms the right to settle said Indians west of 99° west longitude can be obtained, and report to this office with the least delay possible.

Letter of April 26, 1855, from Indian Agent to Commissioner of Indian Affairs.

SIR: I herewith inclose a proposition * *; and also a proposition for the lease of the Choctaw possessions west of the 99th degree of west longitude to the Government, for the permanent settlement of the Wichita and other bands of Indians within the Choctaw country.

Letter of April 24, 1855, from Choctaw Delegates to Indian Agent.

2. We will agree to provide, in the same convention or supplemental treaty, that the Government shall have the permanent use of a limited portion of the western part of our country, for the accommodation of the Wichita and other bands of Indians, for a fair and just consideration; the amount to depend, of course, upon the extent of country required for the purpose. The Commissioner of Indian Affairs, in his letter, requires you to ascertain our terms for the use of that portion of our country west of the 98th degree of west longitude, and also for that west of the 99th degree. We are unwilling to lease, for the purpose mentioned, any portion of our country east

of the 99th degree; but for the lease of that west of that degree we will consent, in behalf of our people, to take the sum of four hundred thousand dollars.

Letter of April 27, 1855, from Secretary of Interior to Commissioner of Indian Affairs.

As I have heretofore said, I have every disposition to act towards these Indians in a spirit of the utmost liberality consistent with the just rights and interests of the United States; and, all things considered, am disposed to think the proposition for the permanent accommodation of the Wichita and other Indians, and the amount demanded therefor, worthy your consideration; and you are authorized to enter into negotiations with the Choctaws on that basis. I think, however, that, notwithstanding their claim to an extent of country west of the 100th meridian of longitude is regarded by the department as without any foundation in law or equity, it might prevent further trouble, in regard to it, to insert an article in the supplemental treaty or convention, now to be held, requiring the Choctaws to relinquish and abandon all right or claim to the same.

Letter of May 2, 1855, from Indian Agent to Choctaw Delegates.

GENTLEMEN: In view of the probability that an arrangement will be effected between the Choctaw and Chickasaw tribes, restricting the western boundary of the "Chickasaw district" to the 98° of west longitude, west from Greenwich, I desire to ascertain whether you will agree, the Chickasaws assenting, to lease the country between 98° and 100° west longitude and between Red and Canadian rivers to the United States, for the permanent settlement of the Wichita and other bands of Indians within the territorial limits of the Choctaw nation; and if

so, upon what terms, it being understood that the C
taws shall relinquish and quitclaim, in favor of
United States, whatever interest they may have in
country lying west of the 100° of west longitude.

Letter of May 3, 1855, from Choctaw Delegates to
dian Agent.

In our communication to you of the 9th ultimo, we
ferred to the prejudices and opposition of our peopl
the location of the Indians referred to within the li
of our country, and our repugnance to such an arra
ment; but we stated that we had every dispositio
comply with the policy and wishes of the Governm
on the subject; and that, if the measure were one of
portance to it, we would take the responsibility and
sent to it, on fair and reasonable terms. In our su
quent communication of the 24th instant, we stated
unwillingness to lease, for that purpose, any portio
our country east of the 99° of west longitude, but tha
would agree to lease that west of that degree, for
sum of four hundred thousand dollars. On further
sideration of the subject, however, since the receip
your letter, we have concluded, in the same spiri
accommodation, to agree to comply with the wishe
the Government by leasing to it the further portio
our country between the 98° and 100° of west longit

The question of the total relinquishment of any por
of our territorial rights is one of even greater deli
and difficulty. We have fully acquainted you with
grounds of our claim to title to the headwaters of
Canadian River, extending as far west as at least to
103° of west longitude. We believe our title to be perfe
valid and good; but as it is questioned, if not dispu
by the Government, west of the 100° of west longit

and we are anxious to put at rest all questions of controversy with it, we will relinquish and quitclaim to it our rights west of that degree of longitude, on fair and equitable terms. The extent of country involved is large; we know it to be valuable; and we believe the acquisition of our title to it to be important to the Government; still we have no disposition to be exorbitant. As a consideration for the whole arrangement, *we would consent to take eight hundred thousand dollars—one half thereof for the lease of the country between the* 98° *and* 100° *west longitude, and the other half for the relinquishment of our right west of the latter degree.*

The above proposition has reference to the arrangement as a whole. Were it to be confined only to the lease of the portion of the country between the two degrees of longitude mentioned, we should for obvious reasons feel constrained to ask not less than six hundred thousand dollars therefor.

Letter of May 4, 1855, from the Indian Agent to the Choctaw Delegates.

If the Choctaws will propose to lease to the United States the territory west of 98° and east of 100° west longitude, (the Chickasaws assenting) and couple with it a relinquishment of all claim west of 100° west longitude, the Government will agree to pay them $600,000.

Letter of June 7, 1855, from Commissioner of Indian Affairs to Acting Secretary of Interior.

* * After consultation with the Secretary of the Interior, and with his concurrence, Agent Cooper was instructed, verbally, to inform the delegation that if they would accept the sum of $600,000 for the lease of the country between the two degrees, and the relinquishment

west of the 100°, the Government would give that sum. The delegation assented to this proposition, and agreed to take the sum of $600,000 for the lease of the territory within the two degrees mentioned, and the relinquishment of their claims to the country west of the 100th degree. The Chickasaw delegation also assented and agreed to the terms of the lease, and the question was settled, as I supposed; but both delegations now contend that the United States shall be restricted, in the number of bands of Indians to be located in the country leased, to such as are now residing in it. With such a limitation on the use of the country, the lease would be of but little value, and I have, therefore, declined to assent to the limitation which the Indians desire to impose, and have claimed that the Government must be left free to locate such Indians as it may desire within the ceded country. * *

The delegations propose, as a compromise, that the Choctaws quitclaim to the country west of 100°, and that they and the Chickasaws will lease the country between 99° and 100° for the permanent settlement of any Indians whom the Government may desire to locate therein, for the sum of $600,000.

Letter of June 14, 1855, from Choctaw Delegates to Commissioner of Indian Affairs.

The lease we had consented to agree to was a limited one, viz: for the permanent settlement, within the country leased, of the Wichita and several alien tribes and bands now in our country, the Government to have the control of them, but we still to retain jurisdiction over the country itself, with the right of settlement therein by Choctaws and Chickasaws as heretofore, as expressed and provided for in the convention. If the Government had the unrestricted right to bring in any and all Indians it pleased, the whole district might soon be filled up with

a discordant, restless and predatory population, which would endanger the frontier settlements of the Choctaws and Chickasaws, deprive us practically of our jurisdiction and necessarily exclude Choctaws and Chickasaws from settling within the district, if they so desired. Such an arrangement would be a virtual sale of that portion of our country, to which we could under no circumstances submit. Moreover the consideration offered would be entirely inadequate. We had agreed to relinquish our claims to territory west of the 100° of west longitude, embracing at least six and a half millions of acres. The district desired to be leased contains quite seven millions more; so that practically the Government would have acquired from us some thirteen and a half millions of acres of land, for the certainly insufficient sum of six hundred thousand dollars.

FEB 27 1900
JAMES H. McKENNEY,
Clerk.

Brf. of Barnes for Choctaws.

Filed Feb. 27, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, *Appellant*,
vs.
THE CHOCTAW NATION and THE CHICKASAW NATION. } No. 337.

THE WICHITA AND AFFILIATED BANDS OF INDIANS, *Appellants*,
vs.
THE CHOCTAW NATION and THE CHICKASAW NATION and THE UNITED STATES. } No. 338.

THE CHOCTAW NATION and THE CHICKASAW NATION, *Appellants*,
vs.
THE UNITED STATES and THE WICHITA AND AFFILIATED BANDS OF INDIANS. } No. 339.

BRIEF FOR THE CHOCTAW NATION.

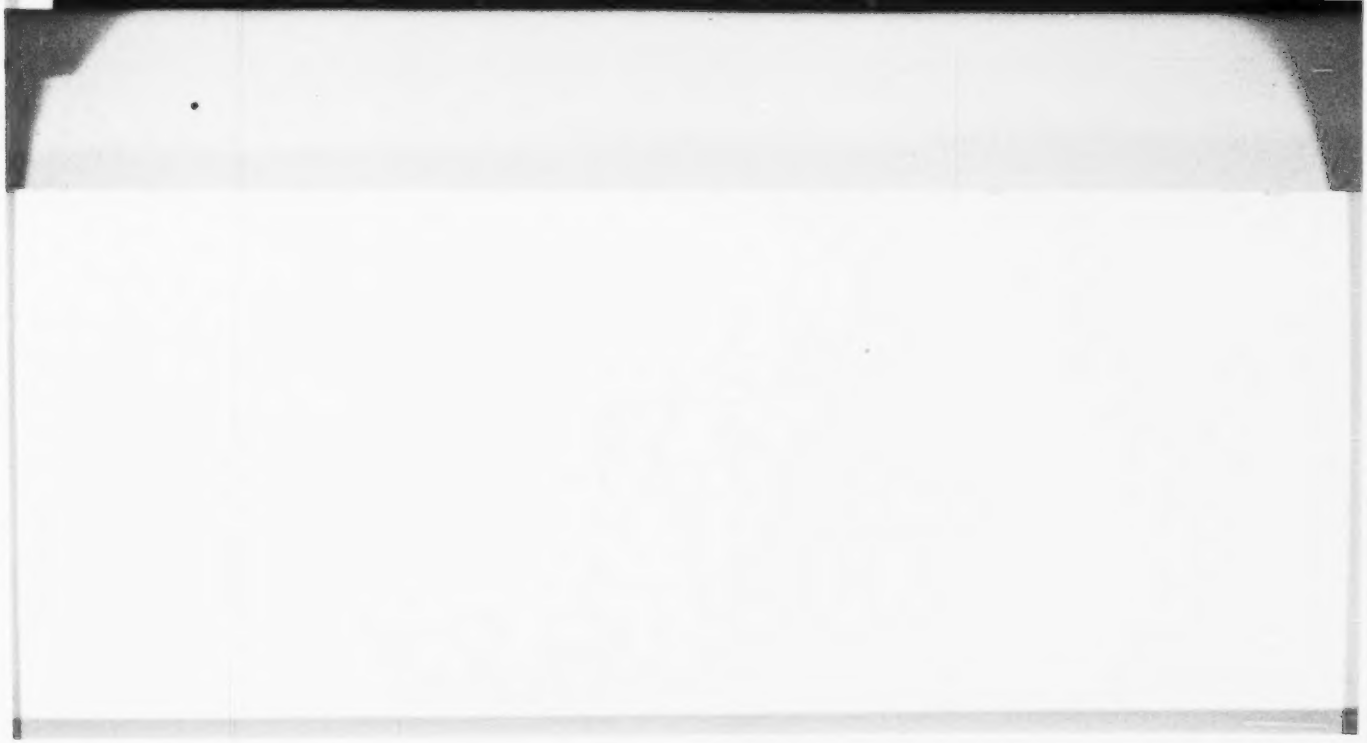
GEORGE T. BARNES,
Attorney for Choctaw Nation.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-3-1900

Canada pages 82 & 83. 139 & 152

Marginal references in writing are by pages to the Appendix to Record printed subsequent to this brief.

A. R. abbreviation for Appendix to Record.



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APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE CHOCTAW NATION.

ORIGIN OF THE CASE.

This case arises out of an agreement made and entered into between the United States and the Wichita and affiliated bands of Indians, at Anadarko, in the Indian Territory, on the 4th day of June, 1891. Under this agreement the Wich-

ita and affiliated bands of Indians ceded to the United States all their right, title, claim, or interest in a certain district here shown on the map—beginning where the 98th meridian west longitude crosses the Washita river, thence up the main channel of said river to 98° 40′, thence up the line of 98° 40′ to the Canadian river, thence down the Canadian river to 98°, and thence down 98° to the point of beginning. Under the terms of this agreement the United States was to allot in severalty to each member of the Wichita and affiliated bands 160 acres of land in said district. The residue of said land was to be opened to settlement under the general land laws of the United States. The lands embraced in this district were a part of what is known as the leased district of said Indian Territory. The leased district constitutes a part of the territory ceded by the United States to the Choctaw Nation of Indians by treaty of October 18, 1820. The Chickasaws subsequently acquired an interest in the same. The United States subsequently reacquired from the Choctaws and Chickasaws this leased district under the treaty of 1855 and the treaty of 1866. The Choctaws and Chickasaws contend that it was acquired by the United States simply for the location thereon of Indian tribes, and that when any of said lands embraced in said leased district are opened to settlement certain legal, equitable, and beneficial interests in said lands immediately accrue to them.

The United States controverts this claim—that is, the act is not to be construed as admitting or denying the validity of the claim. The Wichitas and affiliated bands deny it and assert an exclusive interest in themselves. But, notwithstanding the claim was controverted by the United States and the defendant Indians, the act provided that the Choctaws and Chickasaws might at any time before final judgment enter into negotiations with commissioners who had been appointed by the United States and their successors for a settlement of their claims. The agreement was made subject to ratification by Congress. Congress, in rati-

fying it, provided for the trial of this claim of the Choctaws and Chickasaws. (For this agreement and for the act of Congress see Statute of the United States, 53d Congress, 3d session; act of March 2d, 1895, p. 894.) The leased district contains 7,713,239 acres. The area of the land in controversy, which is a part of said leased district, embraces 743,257.19 acres. A.R. 1

JURISDICTION.

The act confers jurisdiction on the Court of Claims to try this issue. In the trial it is provided that the court is to determine the legal and equitable rights of the parties. The court is required to receive and consider as evidence everything which tends to shed light on the claims of either party. This means that the court is to inquire what are the legal and the equitable rights of the parties, untrammeled by technical rules of procedure and unrestrained by any distinction between law and equity (Old Settlers (Cherokees) *vs.* The U. S., 148 U. S., p. 427).

PARTIES.

The claimants are the Choctaw and the Chickasaw Nations of Indians. The Choctaws own a three-fourths and the Chickasaws a one-fourth interest in this claim. See petition (Record, p. 1): treaties of January 17, 1837; June 22, 1855; 11th Stat., 573; 11th Stat., 611; also Revision of Indian Treaties, 274, 285. These two tribes or nations of Indians have been recognized as distinct political communities, with acknowledged territorial limits, from the commencement of the United States Government. See treaties with Choctaws, 1786, 1801, 1802, 1803, 1805, 1816, 1820, 1825, 1830, 7th Stat.; 1837, 1855, 1866, 11th Stat., 573; 11th Stat., 611; 14th Stat., 769; Revision of Indian Treaties, 1046, 274, 285. With Chickasaws, 1786, 1801, A.R. 20 A.R. 24 A.R. 517 A.R. 5

1805, 1816, 1818, 1832, 1834, 7th Stat.; 1847, 1855, and 1866, 11th Stat., 573; 11th Stat., 611; 14th Stat., 769; Revision of Treaties, 1046, 274, 285. Under these treaties they now occupy well defined districts in the Indian Territory. The Choctaws number between 14,000 and 15,000 people, of whom nearly 10,000 are Indians and about 1,500 are colored of African descent. The Chickasaws number over 7,000, of whom about 3,400 are Indians and 3,700 are colored of African descent (Census Bulletin, 1890, No. 25.

The defendants are The United States and The Wichita and affiliated bands. The Wichitas assert an original title in the whole of the leased district, and also a title, under agreement with the United States, made in pursuance of the treaties of 1855 and 1866, made between the United States and the Choctaws and Chickasaws.

The affiliated bands are tribes who were settled in the same tract with the Wichitas by the United States, and in pursuance of the same treaties of 1855 and 1866. They are known as the Caddoes, Wacoes, Towaconies, Keechies, Delawares, and Ionies. They all, including the Wichitas, do not number 1,100 people—men, women, and children. Of them the Caddoes number one-half, while the Wichitas proper do not exceed altogether more than 175 (Census Bulletin 1890, No. 25).

The claim of the Choctaw and Chickasaw Nations is based on treaties, compacts, and agreements into which they have entered with the United States from time to time.

The defendant Indians set up as the basis of their claim the assertion that the Wichitas were the original possessors of the land in controversy, and that their aboriginal rights were never extinguished, and are subject only to the right therein acquired by their affiliated bands through the acquiescence of the Wichitas in their joint occupation with them since 1859 (defendant's answer, Record, p. 23).

We absolutely deny that the Wichitas were ever the aboriginal owners of the land in controversy. We say

moreover, that even if they were such aboriginal owners, such fact would in nowise relieve the United States Government from the obligations it assumed towards the Choctaws and Chickasaws in the various treaties, compacts, and agreements into which it entered with them. These obligations were absolute and independent of any rights or claims of any other tribe or people whatsoever.

THE ISSUE.

The Choctaws acquired this land under the treaty of 1820. By a subsequent arrangement between the Choctaws and Chickasaws, made in 1837, with the approval of the Government, these two Indian nations became the owners of it as tenants in common. They leased what is called the leased district to the United States by the treaty of 1855, and retroceded it to the United States by the treaty of 1866. The defendants say that this act of retrocession was absolute and unqualified, without any restriction or limitation whatsoever. We say that it was for the use of such Indian tribes as the United States might desire to colonize thereon, and in the event that it ceased to be used for such purpose, it reverted to the Choctaws and Chickasaws and again became their property. This constitutes the issue.

A.R.9

After argument had on this issue in the Court of Claims, the court held that the cession of the territory west of the 98th meridian, known as the leased district by the Choctaws and Chickasaws, made by the treaty of April 28, 1866, was not absolute.

And held that the cession of said territory, made by the said treaty, was made upon a trust of such a character that the sale of the unallotted portion of the Wichita reservation would constitute a breach of the trust, even though such sale should be made for the benefit of the Wichita and affiliated bands of Indians located upon the said reservation.

And thereupon the court decreed that the Choctaw
Chickasaw Nations are in law and equity entitled to
are the owners of the unallotted portion of the Wichita
ervation, and that in the event of the sale of such unallo
portion by the United States they shall be entitled to
shall receive from the United States the proceeds of s
sale.

And upon this decision and decree the counsel of
Government assigns the several grounds of error set f
in their bill of exceptions.

And inasmuch as the court held and decreed that in
case the Wichitas and affiliated bands were nevertheless
titled to an allotment out of said Wichita reservation o
hundred and sixty acres of land each, the counsel for
Choctaws and Chickasaws assigned error thereon, as set f
in their bill of exceptions.

The Choctaws and Chickasaws were two of the tr
usually known to the country as

THE FIVE CIVILIZED TRIBES; THEIR REMOVAL TO INDIAN TERRITORY.

A.R. 7

The country known as the Indian Territory was a pa
Louisiana, acquired from France under the treaty of
Early after its acquisition the United States adopt
policy of transferring the Indian tribes living east of
Mississippi river to the new territory west of that r
On the 26th of March, 1804 (2d Stat., p. 283), Cong
passed an act authorizing the President to exchange l
in the new territory of Louisiana with tribes for their l
on the east side of that river. What is known as the In
Territory was assigned to the tribes since known as the
civilized tribes—the Cherokees, the Creeks, the Semin
who were a branch of the Creeks, both speaking the
language, and the Choctaws and Chickasaws, also
speaking the same language. The two last named are

claimants in this case. The Government had recognized the Cherokees, Creeks, and Seminoles in the same manner in which it had recognized the Choctaws and Chickasaws from our earliest history as a government. (See Cherokee treaties 1785, 1791, 1805, 1816, 1828, 1832, 1835, 7th Stat.; Creeks, 1790, 1796, 1802, 1814, 1825, 1826, 1827, 1832, 1833, 7th Stat.; Seminoles, 1832 and 1833, 7th Stat., and subsequent treaties with these tribes, including treaties of 1866, in Revision of Indian Treaties; also 14th Stat.) They were all recognized as distinct political communities; their territories were marked and defined and their governments within the same were acknowledged.

These five tribes had been neighbors of each other in their original homes in Georgia, Alabama, Mississippi, and Tennessee. (See Jones' Antiquities of Southern Indians, pp. 3, 4, and 7; Bancroft's History of the United States, vol. III, p. 246 *et seq.*, and map.)

The Government encountered many obstacles in carrying out the policy of removal. The war with Great Britain, participated in by southern Indians—especially the Creeks—and the subsequent troubles with Spain on the Florida border greatly delayed the execution of the policy; nevertheless the movement began. A large number of Cherokees, relying on promises made by the President in 1809, had emigrated to the West and settled on the White and Arkansas rivers, in what is now the State of Arkansas. These lands were confirmed to them by treaty in 1817. (See treaty of 1817, 7th Statute, p. 156.) But by new treaties (1828, 7th Statute, 311; 1833, 7th Statute, 411, and 1835, 7th Statute, 478), the Cherokees in Arkansas and Georgia were induced to remove and settle in what is the northern part of the Indian Territory. They surrendered all their lands east of the Mississippi river and received in exchange new homes on the west side of the river. Their new territory was the northern part of the Indian Territory, south of the present State of Kansas, and extending west from the western

boundary of Arkansas as far west as the sovereignty of the United States extended.

The Creeks, in pursuance of the treaties of 1826, 1827, 1832, and 1833 (7th Statute, pp. 286, 307, 366, and 417), finally ceded all their lands east of the Mississippi, and were located on lands in the Indian Territory south of the Cherokees. Their country extended as far west as the Mexican line. (See treaty of 1833, p. 417, as above.) By article IV of said treaty a home for the Seminoles was provided in the same territory with the Creeks. The Seminoles by the treaty of May 9, 1832 (7th Statute, 368), and of March 28, 1833 (7th Statute, 423), ceded their lands in Florida and received their new home in the Indian Territory. (See convention between the United States, the Creeks, and Seminoles, August 7, 1856, Revision of Indian Treaties, p. 165; 11 Stat., 699.)

By the treaties of 1820 (7th Statute, 210) and 1830 (7th Statute, 333) the Choctaws were located in the southern part of the Indian Territory. By the convention of 1837 (Revision of Treaties, 1046; also 11th Stat., 573) between the Choctaws and Chickasaws, the Chickasaws acquired a district in the Choctaw country; and thus, in pursuance of a fixed policy, steadily pursued by the Government, the five civilized tribes, who had been neighbors on the east side of the Mississippi river, were brought in contact with each other as neighbors again in the Indian Territory.

They had not received their new homes through the generosity of the Government. They had surrendered in exchange for them their far more valuable homes. The exchange had been made for good and valuable consideration. But there were other considerations which induced them to make the exchange, and these considerations operated alike on all these five tribes.

MAIN CONSIDERATIONS FOR REMOVAL.

In the treaty of 1828 with the Cherokees (7th Stat., 311) e preamble recites that whereas it is the anxious desire the United States Government to secure to the Cherokee ation a home that shall never, in all future time, be em- arrassed by having extended around it the lines or placed er it the jurisdiction of a State or Territory, nor be essed upon by the extension in any way of the limits of y existing Territory or State: therefore (article 2) the nited States agrees to possess the Cherokees and guarantee them forever the territory described.

The guarantee was repeated in the treaty of 1833 (7th at., 415), with the additional guarantee at the end of arti- l that letters patent shall be issued by the United States soon as practicable for the land hereby guaranteed. By e treaty of 1835 (7th Stat., 478) the United States guaran- d that the lands ceded by the treaties of 1828, 1833, as ll as the additional land ceded by the treaty of 1835, uld be included in one patent, according to the provision the act of May 28, 1830 (4th Stat., 411). This was an authorizing the President, whenever an Indian tribe ich had exchanged lands in any of the States or Territories lands west of the Mississippi to which the Indian title l been extinguished desired it, to cause a patent or grant be made and executed to them for their new lands. der the fifth article of this treaty the United States cov- nted and agreed that the lands ceded should in no future e, without the consent of the Cherokees, be included within territorial limits or jurisdiction of any State or Territory, all rights of local self-government not inconsistent with Constitution of the United States and the acts of Con- s regulating intercourse with the Indians should be ared to them.

A.R. 40

imilar guarantees were made to the Creeks, that no State

2

or Territorial government should ever be placed over them, and that a patent should issue to them for their lands, agreeably to said act of Congress of May 28, 1830.

A. R. 13

The treaty of September 27, 1830, with the Choctaws (7 Stat., 333) provided that under a grant specially to be made the United States shall cause to be conveyed to the Choctaw Nation the territory described, in fee-simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it. It is to be observed that this guarantee was entirely independent of the act of May 28, 1830, for no reference whatever is made to the act in the treaty. The land in controversy was embraced within this territory.

Article IV of this treaty provided:

The Government and the people of the United States are obliged to secure *to the said Choctaw Nation of red people the jurisdiction and government of all persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of red people, and their descendants, and that no part of the land granted them shall ever be embraced in any Territory or State, but the United States shall forever secure said Choctaw Nation from and against all laws, except such as from time to time, may be enacted in their own national councils, not inconsistent with the Constitution, treaties and laws of the United States, except such as may, and have been enacted by Congress, to the extent that Congress, under the Constitution, are required to exercise a legislation over Indian affairs.*

A. R. 9

This was a part of the land already owned and acquired by the Choctaws under the treaty of October 18, 1820.

Article IV provided that the United States are obliged to protect the Choctaws from domestic strife and foreign enemies.

Article XII provides that all intruders shall be removed from the Choctaw Nation and kept without it.

By the convention between the Choctaws and Chickasaws

f 1837 (Revision of Treaties, 1046, 11th Stat., 573), and to
hich the United States was a party, the Chickasaws were
hold their lands on the same terms as the Choctaws held
eir land. By the treaties with the Seminoles, 1832 and
33, they were to be united with the Creeks with the same
rivileges as the Creeks.

But, after all, the great inducement held out to these
ople was removal to a country where they would be free
om the presence of the white man. The volumes known
Indian Removals are full of evidence on these points.
et a few extracts suffice. The Secretary of War, Hon.
ewis Cass, in a letter to the Creek chiefs, urges them to go
here no bad whites will trouble them (8 Indian Removals,
3).

One of the features of certain propositions for the removal
the Cherokees made by Secretary Cass was that all white
ersons, unless specially authorized by the laws of the
nited States, shall be excluded from their country (816).
Governor Gilmer in his message to the Georgia legislature,
ecember 11, 1829, says:

Long experience has satisfied all that the Indian tribes,
en surrounded by white men, continue to disappear until
t out from existence (223).

Secretary Cass to the Creeks, November 1, 1831, says:

In the West you will be remote from the white people, in-
endent of any State authorities, and allowed to manage
r own concerns in your own way (p. 366).

In a letter to Governor Gilmer he says on the subject of
removal of the Cherokees:

t is undeniably true that to remove from their present
nes affords the only hope for their preservation and hap-
ess. * * * The suggestion has been frequently made,
t the Indians, if placed in the West, may again be subject
intrusion and interruption. This is assuming too much,

and more, I should fain hope, than the good faith of this Government will authorize to be conjectured (p. 2).

In a letter to the chairman of the Senate Committee on Indian Affairs, January 30, 1832, he writes that "the same general causes which are everywhere producing want and misery among the Indians who are placed in immediate contact with the white settlements are operating upon the Seminoles (*ibid.*, 751).

Commissioners Eaton and Coffee address the Chickasaws and speakiag for the President say—August 30, 1830:

He knows you cannot live under those laws (laws of the State of Mississippi). To do so will render you a miserable, unhappy people. We advise our red brothers for their own sake to remove, that they may rest in a country free from a white man's interruption (p. 245).

The same commissioners, addressing the Choctaws on the 18th of September, only a few days before the execution of the treaty of September 27, 1830, on the same subject (their subjection to the laws of the State of Mississippi) say:

Are you willing to be sued in courts, then to be tried and punished for any offense you may commit? To be subjected to taxes, to work on roads and attend in musters? For all these you must do. (They urged the Choctaws to go to a country where the President can keep the white man's laws from interrupting and disturbing you.) There no State or Territory will be created, and he will have it in his power to protect you fully in your usages, laws and customs (257).

These extracts with others, says a House report of the 45th Congress, show conclusively *that, so far as the leading tribes are concerned, the main consideration held out to them to induce them to emigrate was that they would escape from the white man's law and go where they could confidently rely on*

overned by their own peculiar customs. (See House Re-88, 45th Cong., 1st session.)

nts were now issued the Cherokees, Creeks, and Choc-These three patents embraced the entire area of the Territory.

patent to the Choctaws was dated March 23, 1842. y is affixed to the petition of claimants in this case. be noted that it was not issued in accordance with atute of May 28, 1830. It was issued in accordance he treaty of September 27, 1830, and embraced the f land described in that treaty. The land in contro-as a part of the leased district was embraced in this f land.

five tribes were now located, not merely as neighbors ir new homes, but with covenants from the United , under the same solemn obligations that their homes l never be subjected to any State or Territorial govern-; that they should be free from the intrusion of the man; that they should hold them as white men hold homes, by fee-simple titles, and that they should be ned by their own laws and customs, subject only to nstitution of the United States and the laws of Con-regulating intercourse with the Indian tribes. They ntered in their new homes, upon a new career, modeled governments after the governments of the States, erected hes, built school-houses, engaged in industrial pur-and have since made commendable progress in the civilized life. While differing in many respects from ther, they thus, under the influence of the policy of vernment, became parts of one common system. And the treaties of the Government with them and the es of the United States in reference to them are to strued together *in pari materia*, so that each of them xplain and elucidate every other part of this general on system. (Endlich on Interpretation of Statutes, . 54.)

I have now stated the issue and the parties and t grounds on which their claims are based. I have endea ored to give some account of the Choctaws and Chickasa and their relations to their Indian neighbors in their ori nal homes—east of the Mississippi. I have endeavored give some account of this removal, together with the moval of their neighboring tribes in their original hom and their removal and settlement again as neighbors their new homes in the Indian Territory. In this conn tion I have referred to the treaties under which these movals took place and these settlements were made. I ha quoted from these treaties so far as was necessary for the purposes.

I now propose specially to inquire into the grounds which the claims of the Choctaws and Chickasaws are base But before proceeding to do so I will refer the court to th various treaties on which these claims rest by quoting much of them as may be necesary for a clear understandi of these grounds.

The first of these treaties is the treaty of October 1 1820:

A.R. 9

I quote from this treaty of October 18, 1820, as follow (7th Statute, 210)

PREAMBLE.

Whereas, it is an important object with the President the United States, to promote the civilization of the Choct Indians, by the establishment of schools amongst them and to perpetuate them as a nation, *by exchanging, for a small part of their land here*, a country beyond the Mississip river, where all, who live by hunting and will not wor may be collected and settled together: and,

Whereas, it is desirable to the State of Mississippi, to ob tain *a small part of the land belonging to said nation*, for th mutual accommodation of the parties, and for securing th happiness and protection of the whole Choctaw Nation, well as preserving that harmony and friendship which

happily subsists between them and the United States, James Monroe, President of the United States of America, by Andrew Jackson, of the State of Tennessee, major general in the Army of the United States, and General Thomas Hinds, of the State of Mississippi, commissioners plenipotentiary of the United States, on the one part, and the Mingoes, head men and warriors, of the Choctaw Nation, in full council assembled, on the other part, have freely and voluntarily entered into the following articles, viz:

Art. 1. To enable the President of the United States to carry into effect the above grand and humane objects, the Mingoes, head men, and warriors, of the Choctaw Nation, in full council assembled, in behalf of themselves and the said nation, do, by these presents, cede to the United States of America, all the land lying and being within the boundaries following, to wit: Beginning on the Choctaw boundary, east of Pearl river, at a point due south of White Oak springs, on the old Indian path; thence north to the said spring, thence northwardly to a black oak, standing on the Natchez road, about forty poles eastwardly from Doake's fence, marked A. J. and blazed with two large pines and a black oak standing near thereto, and marked as pointers; thence a straight line to the head of Black creek or Bouge Loosa; thence down Black creek or Bouge Loosa to a small lake; thence a direct course, so as to strike the Mississippi one mile below the mouth of the Arkansas river; thence down the Mississippi to our boundary; thence around and along the same to the beginning.

Art. 2. For and in consideration of the foregoing cession on the part of the Choctaw Nation, *and in part satisfaction for the same*, the commissioners of the United States, in behalf of said States, do hereby cede to said nation, a tract of country west of the Mississippi river, situate between the Arkansas and Red rivers, and bounded as follows: Beginning on the Arkansas river where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian fork, and up the same to its source; thence due south to the Red river; thence down Red river, three miles below the mouth of Little river, which empties itself into Red river on the north side; thence a direct line to the beginning.

Article 3 provides for commissioners to run the boun
aries mentioned in the first and second articles.

Article 13 relates to an annual appropriation for t
Choctaw Nation.

a. R. 12

It is unnecessary to quote from the treaty of January 2
1825 (7th Stat., 234). It merely relates to a retrocession
the United States of a small part of the territory acquir
in 1820, slightly modifying the eastern boundary line
the Choctaw Nation.

But nothing was said about retrocession of land west
100° at that time in re-arranging boundaries of the cessi
to the Choctaws. Long's report had been published to t
world in 1822. The Choctaws, as appears, in 1855 look
upon their claim as a claim for land, and they then kn
the land had been ceded to Spain. The United States th
knew, if they did not before, that the western boundary
the cession of 1820 was far west of 100°. Upon this poi
the Court of Claims in their decision (Record, p. 384) we
say: "So, if by the treaty of 1820 the Choctaws acquire
title to any territory beyond the 100th meridian, that tit
remained unimpaired so far as any agreement was co
cerned." Why did they not now rectify the western as we
as the eastern boundary?

a. R. 13

I quote the following articles from the treaty of Septem
ber 27, 1830 (7th Stat., 333):

Art. 2. The United States, under a grant specially to b
made by the President of the U. S., shall cause to be co
veyed to the Choctaw Nation a tract of country west of th
Mississippi river, in fee-simple, to them and their descen
ants, to inure to them while they shall exist as a nation an
live on it, beginning near Fort Smith, where the Arkans
boundary crosses the Arkansas river, running thence to th
source of the Canadian fork, if in the limits of the Unite
States, or to those limits; thence due south to Red rive
and down Red river to the west boundary of the Territor
of Arkansas; thence north along that line to the beginnin
The boundary of the same to be agreeably to the treat

made and concluded at Washington city in the year 1825. The grant to be executed as soon as the present treaty shall be ratified.

Art. 3. In consideration of the provisions contained in the several articles of this treaty, the Choctaw Nation of Indians consent, and hereby cede to the United States the entire country they own and possess east of the Mississippi river; and they agree to move beyond the Mississippi river, early as practicable, and will so arrange their removal that as many as possible of their people, not exceeding one-half of the whole number, shall depart during the falls of 1831 and 1832, the residue to follow during the succeeding fall of 1833; a better opportunity in this manner will be afforded the Government to extend to them the facilities and comforts which it is desirable should be extended in conveying them to their new homes.

Art. 4. The Government and people of the United States are hereby obliged to secure to the said *Choctaw Nation of red people the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have the right to pass laws for the government of the Choctaw Nation of red people and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U. S. shall forever secure said nation from and against all laws except such as from time to time may be enacted in their own national councils, not inconsistent with the Constitution, treaties and laws of the United States, and except such as may, and which have been, enacted by Congress, to the extent that Congress, under the Constitution are required to exercise a legislation over Indian affairs. But the Choctaws, should this treaty be ratified, express a wish that Congress may grant to the Choctaws the right of punishing by their own laws any white man who shall come into their nation and infringe any of their national regulations.*

Art. 12. All intruders shall be removed from the Choctaw Nation, and kept without it. Private property to be always respected and on no occasion taken for public purposes without just compensation being made therefor to the rightful owner, &c.

Art. 18. The U. S. shall cause the lands hereby ceded to be surveyed, and surveyors may enter the Choctaw country for that purpose, conducting themselves properly and disturbing or interrupting none of the Choctaw people. But

no person is to be permitted to settle within the nation, or the lands to be sold before the Choctaws shall remove. And for the payment of the several amounts secured in this treaty, the lands hereby ceded are to remain a fund pledged to that purpose until the debt shall be provided for and arranged. *And further, it is agreed that in the construction of this treaty wherever well-founded doubt shall arise, it shall be construed most favorably towards the Choctaws.*

a.R.29

I here introduce a copy of the patent provided for by the second article of this treaty of 1830:

The United States of America to all to whom these presents shall come, Greeting:

Whereas, by the second article of the treaty begun and held at Dancing Rabbit creek, on the fifteenth day of September, in the year of our Lord, one thousand eight hundred and thirty [as ratified by the Senate of the United States on the 24th day of February, 1831], by the commissioners on the part of the United States, and the Mingoes, chiefs, captains and warriors of the Choctaw Nation, on the part of said nation, it is provided that "the United States, under a grant specially to be made by the President of the United States shall cause to be conveyed to the Choctaw Nation" a tract of country west of the Mississippi river, in fee-simple to them and their descendants, to inure to them, while they shall exist as a nation, and live on it, beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas river, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red river, and down Red river to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. the boundary of the same to be agreeably to the treaty made and concluded at Washington city in the year 1825.

Now, know ye that the United States of America, in consideration of the premises, and in execution of the agreement and stipulation in the aforesaid treaty, have given and granted, and by these presents do give and grant, unto the said Choctaw Nation the aforesaid tract of country west of the Mississippi, to have and to hold the same, with all the rights, privileges, immunities and appurtenances, as intended to be conveyed to them in the aforesaid article, in fee-simple,

to them and their descendants, to inure to them while they shall exist as a nation and live on it, liable to no transfer or alienation except to the United States and with their consent.

In testimony whereof, I, John Tyler, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed. Given under my hand at the city of Washington, the twenty-third day of March, in the year of our Lord one thousand eight hundred and fifty-two, and of the United States, the sixty-sixth.

By the President:

JOHN TYLER.

DANIEL WEBSTER,
Secretary of State.

And I here quote so much of the act of Congress of May 28, 1830 (4 Stat., 411), as is necessary: A.R. 40

Be it enacted, &c., That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States west of the River Mississippi, not included in any State or organized Territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside and move there, and to cause each of said districts to be so described, by natural or artificial marks, as to be easily distinguished from every other.

2. *And be it further enacted*, That it shall and may be lawful for the President to exchange any or all of such districts, so to be laid off and described, with any tribe or nation of Indians now residing within the limits of any of the States or Territories, and with which the United States have existing treaties, for the whole or any part or portion of the territory claimed and occupied by such tribe or nation, within the bounds of any one or more of the States or Territories, where the land claimed and occupied by the Indians is owned by the United States, or the United States are bound to the State within which it lies to extinguish the Indian claim thereto.

3. *And be it further enacted*, That in the making of any

such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided, always*, That such lands shall revert to the United States if the Indians become extinct or abandon the same.

I quote this act in connection with these treaties and this patent because the defendants say in their answer (pp. 3 and 4) that the United States derived its authority to agree to convey the lands mentioned in the patent only under this act. I think these extracts are sufficient to make the court, upon examination, clearly to understand the argument which I have the honor to submit.

THE CHOCTAW TREATIES OF 1820, 1825, AND 1830.

When the treaties were made with the Cherokees and the Creeks under which they acquired lands in the Indian Territory, the western boundary of the United States, between the United States and Spain, and subsequently with Mexico, was clearly defined. The treaty with the Cherokees in 1828 defined the limits of the territory granted them as extending as far west as the sovereignty of the United States extended. The treaty with the Creeks extended their western limits to the Mexican line.

But although at this time the 100th degree of west longitude had been fixed as the boundary between the United States and Spain, subsequently with Mexico, neither the Cherokee nor the Creek treaty refers to this degree of longitude as the boundary line, showing clearly that the United States commissioners recognized that such a description was not in the comprehension of the Indian.

But the treaty with the Choctaws antedated the establish-

ment of the boundary line between Spain and the United States fixed by the Spanish treaty of 1821.

By reference to the Choctaw treaty of 1820 (October 18th), it will be seen that the United States, for and in consideration of certain lands east of the Mississippi river, ceded by the Choctaws to the United States by the first article of said treaty, in part satisfaction of the same ceded to the Choctaws by the second article of said treaty a tract of country west of the Mississippi river, between the Arkansas and Red rivers, bounded as follows: Beginning on the Arkansas river, where the lower boundary line of the Cherokee strikes the same, thence up the Arkansas to the Canadian fork, and up the same to its source; thence due south to the Red river; thence down Red river three miles below the mouth of Little river, which empties itself into Red river on the north side; thence a direct line to the beginning (7th Stat., 210).

The lands ceded by the Choctaws to the United States under the first article of said treaty of 1820 were a small part of their lands then owned by them in the State of Mississippi. Defendant's Indian Brief, p. 231, put it at 5,169,788 acres. They quote American State Papers, vol. 2d, Indian Affairs, p. 499. General Jackson's report, 1820, says about 6,000,000 acres. They comprised more than half of the river front of that State; were very valuable for farming purposes, and were the richest cotton lands in the State.

By the treaty of 1825 (7th Stat., 234) the eastern boundary line described in the treaty of 1820 was slightly modified. The Choctaws, under this treaty of 1825, retroceded to the United States a small part of the tract acquired under the treaty of 1820, on its eastern border, which was annexed to the then Territory, now the State of Arkansas. It is unnecessary in this case to further refer to the treaty of 1825. The United States did not seek *for retrocession west of* 100°, and *this was three years after the publication of Long's report.*

a.R. 9

Under this cession of 1820 to the Choctaws the whole sout
ern part of the Indian Territory became Choctaw count

We next call attention to the fact that there was no c
sion of any land, not even a single acre, by the Unit
States to the Choctaws under the treaty of 1830.

a.R. 13

Article 2 of the treaty of 1830 stipulated that the Unit
States should issue a patent to the Choctaw Nation for a
that portion of their territory ceded them under the trea

a.R. 12

of 1820, as modified by the treaty of 1825, as described i
said article 2.

The treaty of 1830 did not cede an acre of land to th
Choctaws. It provided for a formal deed to a part of th
land already ceded in 1820. The execution of such a dee
was in nowise inconsistent with the former cession.

The patent herein incorporated was issued in accordan
with this article of the treaty of 1830, and it is so stated i
said patent, and it follows the description of the land a
embodied in said article.

There was a cession of land in the treaty of 1830, but i
was a cession from the Choctaws to the United States. I
consideration of the provisions of the several articles in th
treaty of 1830, the Choctaws ceded to the United State
under the third article of said treaty, all their remaining
lands east of the Mississippi river. This tract was estimate
at more than ten million acres of land. Deft's Ind. Brie
p. 231, quoting Report of Com. Ind. Affairs, 1836, p. 46
puts it at 7,796,000. I get my statement of 10,000,000 fro
119th U. S., 1.

a.R. 13

Among other provisions in said treaty of 1830, in additio
to the guarantee of a patent, as prescribed in said secon
article of the treaty of 1830, the United States obligated i
self in the fourth article to *secure to said Choctaw Nation*
red people the jurisdiction of all persons and property th
may be in their limits west, so that no State or Territory shou
ever have the right to pass laws for the government of the Ch
taw Nation or their descendants, nor should any State or T

torial government ever be placed over them, and the United States should secure them from all laws except such as might be passed by their national councils. The United States were also, by article 12, to secure them against the intrusion of white people.

Now, it is manifest that all the land acquired by the Choctaws in the West was acquired under the treaty of October 18, 1820. The entire tract, as described in said treaty of 1820, was paid for, and more than paid for, by the lands ceded by the Choctaws under the treaty of 1820 east of the Mississippi.

The land west of 100 degrees of west longitude was as fully paid for under that treaty as the land east of 100 degrees, subsequently described in the patent. The cession of 1820 was an absolute and unqualified cession. It was without any restriction, limitation, or reservation whatever. *There was no reservation on account of any tribe having aboriginal ownership or possessory rights in said lands whatsoever.* It was as free from any reservation of the kind as the lands which they had ceded the United States east of the Mississippi river. This is not only true, but it is impossible to imagine it could have been otherwise. In the language of Judge Wilson in his brief on this point, it is impossible to conceive that the Choctaws would relinquish the sole occupancy of their lands east of the Mississippi, where they had lived from time immemorial, for a tract of land in another and a strange country, that they were to occupy in common with other tribes, to whom they were total strangers, and whose language, habits, customs, and interests were wholly different from their own.

There was not only no additional cession to the Choctaws by the treaty of 1830, but there was no additional title. The title was full and complete and without limitation, which passed from the United States to the Choctaws under the treaty of October 18, 1820.

There was no money consideration promised or paid for the new cession of ten million of acres in Mississippi by the Choctaws to the United States under the treaty of 1830. It was not an exchange of lands east of the Mississippi river for lands west of that river. *The latter tract had already been secured to them by its cession under the treaty of* 1820 (119th U. S., p. 38).

It is notorious as an historical fact (says the Supreme Court of the U. S. in the case of the Choctaw Nation *vs.* The U. S., 119th U. S., p. 37), as it abundantly appears from this record, that great pressure had to be brought to bear upon the Indians to effect their removal and *the whole treaty was evidently and purposely executed, not so much* to secure to the Indians the rights for which they had stipulated, as to effectuate the policy of the United States in regard to their removal.

The main consideration which induced them to remove was the promise of local self-government, the guarantee that no State or Territorial government should ever be placed over them, that they should be removed to a country where they would not be pressed upon by white neighbors, and that all intruders should be removed from their new homes.

A.R.40

The act of Congress of May 28, 1830 (4th Stat., 411), cited by defendants in their answer, and which I have quoted in this brief, can have no reference to the case of the Choctaws. This was a statute intended to promote the removal of the Indians living east of the Mississippi river to lands west of that river. It authorized the President to exchange lands west of the Mississippi where the Indian title had been extinguished for lands east of the Mississippi still held by them, and to assure to the tribes which would make the exchange a patent or grant to the lands which they might receive west of the Mississippi. Now, it is impossible that this statute should have any reference to the case of the Choctaws.

The Choctaws never acquired, by exchange or otherwise, an acre of land from the United States except under the treaty of 1820, and this was nearly ten years before the act

of 1830 was passed. It was impossible that it could have any reference to the treaty of 1830, for there was no exchange of lands under the treaty of 1830. Accordingly the act is not referred to, either in the treaty of 1830 or in the patent of 1842 issued in conformity to it.

Neither the act of May 28, 1830, nor any other act of Congress was necessary to authorize the United States to convey title by treaty. The treaty of 1820 alone, as we have seen, conveyed the lands west of the Mississippi to the Choctaws. This treaty conveyed the land in express terms. The language is: "For and in consideration of the foregoing cession on the part of the Choctaw Nation, and in part satisfaction of the same, the commissioners of the United States do *hereby cede* to said nation." It is not an agreement to cede. There is an actual cession by the treaty itself. No subsequent legislation is necessary to give effect to it. The treaty of 1820 itself is the channel, and the sole channel, through which the title passes from the United States to the Choctaw Nation. In Holden *vs.* Joy, 17 Wallace, 242–3, the Supreme Court of the United States say:

> Express power is given to the President by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur * * * and it must be assumed that the framers of the Constitution intended that it should extend to all those objects, which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty.

In 2d Peters, 314, in the case of Foster *v.* Neilson, the Supreme Court say:

> A treaty is in its nature, a contract between two nations, not a legislative act.
>
> * * * * * * *
>
> In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself, without the aid of any legislative provision.

We have just seen that this was the case in the treaty o 1820. In the treaty of 1830 there was a covenant that th President should cause to be conveyed to the Choctaw Na tion in fee-simple to them and their descendants the tract of country described. A similar provision was in the treaty under consideration in the case of Holden, *v.* Joy, 17th Wal lace, 211. In that case it was insisted that the President and Senate, in concluding a treaty, could not lawfully cove nant that a patent should issue to convey lands without the consent of Congress, but which the court say cannot be ad mitted:

On the contrary there are many authorities, where it is held that a treaty may convey to a grantee a good title to such lands without an act of Congress confirming it, and that Congress has no constitutional powers to settle or in terfere with rights under treaties, except in cases purely political. Much reason exists in view of those authorities and others which might be adduced for holding that the objection of the appellant is not well founded, but it is not necessary to decide the question in this case, *as the treaty in question has been fully carried into effect, and its provisions have been repeatedly recognized as valid* (pp. 246–7).

These principles are clearly set forth in the head-notes of this decision, in the following language:

The Indian tribes are capable of taking as owners in fee simple, lands by purchase, when the United States in form, and for a valuable and adequate consideration so sell them to them. Such sale is properly made by treaty.

Judge Parker in the case of The U. S. *vs.* Payne, 2d Mc Crary, 290, which decision is quoted in full in Report No. 3147, H. of R., 51st Congress, 1st session, p. 31 to 35, citing this very case of Holden *vs.* Joy, among others, says:

The treaty-making power has a right to convey title to the lands of the United States, without an act of Congress, and if a treaty acts directly on the subject of the grant it is equivalent to an act of Congress and the grantee has a good title.

Besides, it is too late to raise this question as to whether an act of Congress was necessary to authorize the Government to convey lands by treaty. Some things must be considered settled by courts. Such a question can no more be raised now than we could raise the question whether it was constitutional to acquire the Territory of Louisiana. The treaty of 1820 has long since been carried into effect. And, furthermore, both the treaties of October 18, 1820, and September 27, 1830, have been recognized by the Supreme Court of the United States (Choctaw Nation *vs.* The U. S., 119th U. S., 1).

And both of these treaties, of 1820 and 1830, have also been repeatedly recognized by acts of Congress:

The act of Congress of March 5, 1837 (5th Stat., 180), making an appropriation under the fourteenth article of treaty of September 27, 1830 (5th Stat., 180).

An act amending same February 22, 1838 (5th Stat., 211).

Act of August 23, 1842, providing for satisfaction of claims under fourteenth and nineteenth articles of treaty of September 27, 1830 (Stat., vol. 5, p. 513).

Indian appropriation act, March 3, 1845 (vol. 5, p. 777).

For amounts awarded Choctaw claimants under treaty of September 27, 1830: act of July 21, 1852 (vol. 10, p. 19).

Permanent annuity under thirteenth article of treaty of October 18, 1820; act of August 30, 1842 (10th Stat., 42).

For appropriation under treaty of October 18, 1820; act of March 3, 1853 (10th Stat., 227).

The act of March 1, 1847, (9th Stat., 132), making an appropriation for carrying out thirteenth article of treaty of October 18, 1820.

Under same act appropriations are made for obligations arising under treaty of 27th September, 1830.

The act of June 19, 1860 (12th Stat., 48) appropriations in pursuance of treaty of October 18, 1820.

So also act of March 2, 1861, 12th Stat., 224.

So also act of June 25, 1864, 13th Stat., 165.

So also act of March 3, 1865, 13th Stat., 544.

So also act of July 26, 1866, 14th Stat., 258.

So also act of March 2, 1877, 14th Stat., 497.

Many acts besides could be cited, recognizing b these treaties of October 18, 1820, and September 27, but these are amply sufficient.

We repeat that the conveyance under the treaty o was full and complete; that the act of May 28, 183 no reference to the Choctaw treaty of 1820 or the Ch treaty of 1830; that both of these treaties were entire dependent of said act; that no act of Congress is nece to authorize the United States to convey title by treaty that if any such act was necessary both of these t have been validated by repeated acts of Congress for than sixty years and by the Supreme Court of the U States.

And now, independent of all considerations wha even if it were established that the Wichitas had a rig occupation, this right might be recognized in the fo compensation, but the superior right of those cla under a cession from the Government by treaty and out a patent is not open to discussion.

G.R.#9 Beecher vs. Wetherly, 95 U. S., 517-526.

Now as to the extent of the cession under the trea 1820 and its western boundary.

At the date of the cession to the Choctaws, Octob 1820, the western boundary of the United States wa western boundary of Louisiana, as acquired from Fra treaty of April 30, 1803 (8th Statute, p. 200). The w boundary line of Louisiana thus became the western b ary line of the United States. It remained so until boundary line was fixed by the Spanish treaty of That treaty was signed the 22d of February, 1819. I not ratified by Spain until the 24th of October, 182 was not ratified by the United States until the 19th o

ruary, 1821 (8th Statute, 252). The western boundary of the United States as fixed by the third article of that treaty as to these lands was the 100th degree of longitude west from London, the said degree of longitude being fixed as the boundary line from where the Red river crosses it to the Arkansas river.

The date of the cession to the Choctaws was October 18, 1820, and the treaty was proclaimed January 8, 1821 (7th Statutes, 210). So this treaty was prior to the consummation of the Spanish treaty, ratified February 19, 1821. a. R. 9

The treaty with Spain was signed the 22d of February, 1819. By its terms it expired six months thereafter for want of ratification by the King of Spain, to wit, on the 22d of August, 1819. The treaty was then dead. See letters of Mr. Forsyth, American minister, quoted in Paine's Reply Brief, pp. 10 and 11; letter of Mr. Adams, American Secretary of State, 3d of May, 1820, pp. 11 and 12; message of President Monroe, 9th of May, 1820; opposition to any renewal of a treaty on same terms, Henry Clay, in House of Representatives, pp. 12 and 13, and see same quoted more fully in Paine's Original Brief, p. 57. See American State Papers, For. Rel., vol. 4, pp. 651–'7, 661–687. See Paine's Supreme Court Brief as to western boundary of Louisiana, where the subject is more elaborately discussed, p. 78 *et seq.*, and as to Spanish treaty of 1819, p. 91 of same brief, *et seq.*

This dead treaty was resurrected and ratified by Spain October 24, 1820, and was not ratified by the United States until the 19th of February, 1821 (8th Stat., 252). The treaty with the Choctaws was executed October 18, 1820; reached War Department December, 1820; transmitted by Secretary to President December 12, 1820; by President to Senate December 14, 1820; referred to a committee; received from committee December 19; ratified December 21, and proclaimed January 8, 1820. Brief of counsel for the United States in Court of Claims, p. 57, admits it probable that the Senate did not know of the ratification of the Spanish treaty a. R. 11

by Spain on October 24, 1820, when it ratified the treat with Choctaws, December 21, 1820.

It is very certain that the Government of the United States did not know at this time of the ratification by the King of Spain. That fact was communicated by the Spanish Minister to the American Secretary of State 12th of February, 1821. The President notified the Senate February 13, 1821 (American State Papers, For. Rel., vol. 4, p. 650). Senate advised ratification February 19, 1821 (Executive Journal, vol. 3, p. 244).

The western boundary of the United States, at the date of the Choctaw cession, was the western boundary of Louisiana.

The cession of 1820, modified by the treaty of 1825, was a tract of country west of Arkansas, beginning on the Arkansas river, where it strikes the western boundary of Arkansas, thence up the Arkansas to Canadian fork and up the same to its source, thence due south to Red river, then down Red river, etc. This included the leased district of which the land in controversy was a part.

The cession extended up the Canadian fork to its source. There was no limitation as to whether the source of the Canadian was or was not within the limits of the United States. There was such a limitation in the treaty of 1830—as to the lands—for which it was provided by said treaty of 1830 a patent should issue.

The Canadian rises among the Gaudalupe mountains in New Mexico, and after flowing south for about 200 miles makes a bend to the east, passes through portions of Texas and the Indian Territory, and enters the Arkansas river about 500 miles from its mouth (Appleton's New American Encyclopedia—article, Canadian River).

Its source is through a number of small streams contributing to its formation between the 104th and 105th degrees W. longitude, but east of the Rocky mountains. (See Rand & McNally's Map of New Mexico).

General Marcy, who, as Captain Marcy, commanded an exploring party through this country in 1852, located the source of the South fork of Red river, now decided by the Supreme Court of the United States in the late decision in the case of The United States *vs.* Texas, to be the main Red river at 104° 7′ 11″, which is near the western boundary of Texas, as now established (Senate Ex. Doc. No. 54, 32d Cong., 2d session, quoted in note on p. 25; U. S. *vs.* Texas, 162 U. S., 1). 9. R. 138

It is clear, therefore, that a line drawn due south from the source of the Canadian river will not strike Red river, because the source of Red river is far to the east of the source of the Canadian river. This course of due south was therefore inconsistent with the two natural objects which the treaty of 1820 called for—the source of the Canadian and the source of Red river. Now, it is a universal rule that course and distance yield to natural objects (6th Wheaton, 580; Princeton's Heirs *vs.* Bowman; so also Newsome *vs.* Prior, 7th Wheaton, 7). C. J. Marshall said: "The courts of Tennessee and all other courts by whom cases of this description have been decided have adopted the same principle and adhered to it. It is that the most natural and most certain calls shall control those which are less natural and less certain. A call for a natural object as a river or a known stream, a spring or even a marked tree, shall control both course and distance. As we cannot therefore draw a line due south from the course of the Canadian to the Red river, we must connect the sources of the two rivers by a straight line." Such a line might fall within the territory owned by Spain in 1820; but it is certain that the cession of the Choctaws under the treaty of 1820 carried all the land between the 100th and 103d degrees of west longitude and the Red and Canadian rivers. It is within the terms of description of the land ceded to the Choctaws by the treaty of October 18, 1820. It is just as much a part of the consideration given for the lands which they ceded to the

United States under that treaty east of the Mississippi is were the lands between the western boundary of Arkansas and the 100th degree of west longitude. It contained 10,296 square miles and 6,589,440 acres. (See Jones' Report, Senate No. 552, 52d Cong., 1st session, pp. 34, 35.)

Counsel for Government contends that we are not to be governed by the terms of description in the treaty. He says the supposed source of the Canadian river is to control, and not the real source, and he says the supposed source was somewhere in the vicinity of the 100th degree of west longitude, and therefore that the western boundary of the cession did not extend beyond the 100th degree west longitude. Now, there is nothing doubtful in the terms of description employed in the treaty. If not then accurately ascertained it was ascertainable, and so could not be doubtful, and therefore the authorities cited do not apply. The argument is necessarily speculative. It is based on presumption.

The counsel presumes that certain maps were referred to—maps scarcely known and still quite unknown, the maps of Arrowsmith, Pike, Melish, Pinkerton, and Darby; but there is not the slightest evidence that any maps were used or referred to in the negotiations which preceded the execution of the Choctaw treaty of 1820. There is no proof that either of the commissioners or any other officer of the Government considered the question of longitude. Most certainly the Indians were wholly ignorant of lines of longitude or latitude. We have the minutes of the council preceding the execution of the treaty, to be found in American State Papers, Indian Affairs, vol. 2, pp. 235 to 237. There is no reference therein to maps, nor degrees of longitude; but we do find therein the address of the United States commissioner, bearing date Choctaw Treaty Ground, October 13, 1820—five days before the execution of the treaty—in which these commissioners—Generals Jackson and Hinds—said to the Choctaws that the limits of their new country will extend from the Arkansas river, where

ie Cherokee line begins, south to the Red river and west to
ie head source of the Arkansas river.

Now, there is nothing here referring to the 100th merid-
n as the western boundary, but what is stated concerning
vers and their headwaters as boundaries is clearly within
ie comprehension of the Indian, and so were the words of
ie treaty.

We have seen that in subsequent treaties with the Chero-
ees and the Creeks, even when the United States boundary
id become fixed at 100° by the Spanish treaty, they do
ot mention that degree as the boundary, but in the one
se fix the western limits of the United States as the bound-
y and in the other the Mexican frontier. Even when the
eaty of 1830 was made with the Choctaws, the western
oundary is not described as the 100th degree of longitude,
it the language fixing the limits of the land for which the
atent was to be issued is, "running to the source of the
anadian fork, if in the limits of the United States, or to
ose limits." The argument of counsel is clearly based
one on presumption.

The Indians evidently knew nothing about degrees of
itude or longitude; but they knew the courses and
urces of rivers, and they accepted the natural boundaries,
mentioned in the treaty, whether then determined or
erwards ascertained. But the source of the Canadian
s actually ascertained before the treaty was submitted to
e Senate. Major Long's expedition established this be-
nd controversy. His report was filed November, 1820,
d the treaty was not proclaimed until the 8th of January,
21. The Government cannot escape the fact that it had
ual knowledge of the source of the Canadian.

Upon this point the Court of Claims, page 45 of the de-
ion (Transcript of Record, p. 393), say:

On July 30, 1820, Major Stephen H. Long, of the topo-
aphical engineers, in command of a detachment of a
all exploring party, sent out by the Secretary of War in

1819 to explore the Mississippi and Missouri rivers, reached a small stream which he believed to be the Red river. * * * He substantially reported that the source of the Canadian was in the neighborhood of the 104th meridian. This report of Major Long reached the War Department in November, 1820. * * * If Long's letter was received before Nov. 8th, 1820, it was in possession of the Government two months before the ratification of the treaty with the Choctaws. If received on the last day of November, it was more than a month before. No matter what time in November the letter was received, the Government had knowledge before the ratification that the source of the Canadian was far west of the 100th meridian. The presumption must be that the treaty-making power had this knowledge.

See, further, Paine's Supreme Court Brief, pp. 97 to 104.

Now, there can be no question that the Choctaws would have been entitled to just as much compensation for a relinquishment of the title acquired by them from the United States *if the United States had no title to these lands as if the United States had a full and unquestioned title to the same.*

But in truth this tract of land did belong to the United States at the time of the cession to the Choctaws, on the 18th of October, 1820.

The Spanish treaty had not been ratified, and this tract was then a part of Louisiana as acquired from France in 1803. Louisiana was originally a French province. As to basis of French claims, see letter of John Q. Adams, Secretary of State, to Spanish minister, page 31 of Senate Report No. 552, 52d Cong., 1st session, with extracts from diplomatic correspondence and maps affixed to said report.

A.R. 187 also 78 et seq

France ceded Louisiana to Spain, in 1762, with boundaries undefined (Bancroft's History of the U. S., vol. IV., p. 452). In 1800 Spain ceded it to France, and on April 30, 1803, France ceded it to the United States, still with boundaries undefined (8th Stat., 200), but in its entirety.

The boundaries were unknown at the time (conversation between Bonaparte and the French minister Marbois,

Blaine's 20 Years in Congress, vol. 1st, p. 20; Jefferson's opinion that the Rio Grande was the western boundary in the lower part and the Rocky mountains in the northern or upper part, *ibid.*, p. 11).

Mr. Jefferson's views, Randall's Life of Jefferson, vol. III, pages 110, 355: He believed the Rio Grande the western boundary as far as that river extended (note on same page; see also p. 471).

See opinion of M. Lousat, commissioner who received Louisiana from Spain and transferred it to the United States; letter of Mr. Madison, Secretary of State, to our minister to France, Robert R. Livingston, January 31, 1804: Appendix to Senate Report 552, 52d Congress, first session.

Texas claimed the Rio Grande as its western boundary throughout its length (act of Texas Congress, Dec. 19, 1836, Lalor's Political Cyclopedia; title, Texas). This would have extended the western boundary beyond the 106th and in some parts beyond the 107th degree of west longitude.

Mr. Benton contended that the Spanish settlements on the Pecos were made anterior to the original French discoveries. This would have extended the Spanish claims to the 105th and probably to the 104th degrees west longitude (Mr. Benton's 30 Years in the Senate, vol. 1st, pp. 15 and 672, and vol. II, p. 600). Views of Mr. Packenham, British minister, who conducted negotiations on the Oregon question with Calhoun, and afterwards with Mr. Buchanan, as Secretary of State: That in the upper part the highlands separating the waters of the Mississippi from those flowing into the Pacific was the true boundary (Calhoun's Works, vol. V, p. 442). The western boundary of the United States certainly extended as far west as the 103d degree of west longitude at the date of the Choctaw treaty of October 18, 1820.

The United States by this treaty of October 18, 1820, for one and the same consideration recited in said treaty, ceded to the Choctaws the entire tract of country extending

certainly as far west as the 103d degree of west longitude and including in its limits the tract extending from the western boundary of Arkansas to the 100th degree of west longitude, which was afterwards included in the patent granted to the Choctaw Nation. This portion of the tract west of the 100th degree of west longitude, containing 6,589,440 acres, was transferred by the United States to Spain by the treaty ratified on the 19th of February, 1821.

Under such circumstances, whether the United States owned it or not, it became responsible to the Choctaw Nation for its value. The United States was the guardian and the Choctaw Nation its ward; and yet it was not until 1855, when the United States was seeking new and other objects of advantage from the Choctaws, after a lapse of a period of 34 years, that we first learn of any recompense whatever to the Choctaws for this long and unjust deprivation of this magnificent property.

The next in order of time comes the convention between the Choctaws and Chickasaws, by which the latter tribe became incorporated with the Choctaws.

This I have already referred to; but in preserving the connection I again call attention to it. The Chickasaws had ceded their lands east of the Mississippi to the United States. They now sought a home with the Choctaws, and as they spoke nearly the same language and had been the neighbors of the Choctaws east of the Mississippi, they entered into a convention with the Choctaws, which was approved by the United States. (See Revision of Treaties, p. 1046, 11 Stat., 573.) It will be sufficient to quote article 1 from this convention, which bears date January 17, 1837:

Q. R. 20

Article 1st. It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country, to be held on the same terms that the Choctaws now hold it, except the right of disposing of it (which is held in common with the Choctaws and Chickasaws) to be called the Chickasaw district of the Cho

w Nation; to have an equal representation in their gen-
ral council, and to be placed on an equal footing in every
ther respect with any of the other districts of said nation,
xcept a voice in the management of the consideration
hich is given for these rights and privileges, and the Chick-
saw people to be entitled to all the rights and privileges of
Choctaws, with the exception of participating in the Choctaw
nnuities, and the consideration to be paid for these rights
nd privileges, and to be subject to the same laws which the
Choctaws are, but the Chickasaws reserve to themselves the
ole right and privileges of controlling and managing the
esidue of their funds, as far as is consistent with the late
reaty between said people and the Government of the
nited States, and of making such regulations and electing
uch officers for that purpose as they may think proper.

It is necessary to bear in mind the formation of this union in order to understand much of the subsequent history.

HE TREATY OF 1855; CHOCTAWS RELINQUISH CLAIM TO LANDS WEST OF 100 DEGREES; CHOCTAWS AND CHICKASAWS LEASE LANDS BETWEEN 98 AND 100 DEGREES WEST LONGITUDE.

In 1845 the United States annexed the Republic of Texas. War followed with Mexico, and large acquisitions of territory were made from Mexico. The boundaries of Texas and New Mexico were adjusted. Large bands of Indians roamed through these territories. They were committing serious depredations on frontier settlements and on travelers through Texas. Texas became clamorous for their removal beyond her borders. In February, 1855, Robert L. Neighbors, special Indian agent for Texas, suggested to Mr. Manypenny, then Commissioner of Indian Affairs, the propriety of opening negotiations with the Choctaw delegation, then in Washington, for a tract of country lying on the east side of Red river, known as Cache creek, near Wichita mountains, for the colonization of the Wichita In-

dians, and such other prairie Indians as may be convenient to that location. (Sen. Ex. Doc. No. 13, 48th Cong., 1st session, p. 15. To be found in my Book of Docs. B.) Here, then, we find occasion for another treaty; and on the 22d of June, 1855, at Washington city, Commissioner Manypenny, representing the United States, entered into a new treaty with the Choctaws and Chickasaws (11th Stat., 611). Among other objects recited in the preamble is the very object suggested by Superintendent Agent Neighbors and almost in the language quoted from his letter, but with it the United States coupled a desire that the Choctaws should relinquish all claims to any territory west of the 100th degree of west longitude. The preamble reciting the object of the treaty reads:

a.R. 24

Whereas, the political connection heretofore existing between the Choctaw and Chickasaw tribes of Indians has given rise to unhappy and injurious dissensions and controversies among them, which render necessary a readjustment of their relations to each other and to the United States; and

Whereas, the United States desire that the Choctaw Indians shall relinquish all claim to any territory west of the 100th degree of west longitude, and also to make provision for the permanent settlement within the Choctaw country of the Wichitas, and certain other tribes or bands of Indians, for which purpose the Choctaws and Chickasaws are willing to lease, on reasonable terms, to the United States, that portion of their common territory which is west of the 98th degree of west longitude.

Now here is the first suggestion of compensation to the Choctaws within the long period of 34 years for payment for those lands which the Choctaws had bought and paid for, but which the United States without their consent had transferred to Spain. In the meanwhile, during this same long period of 34 years, the guardian, the United States, had been in possession of the lands in Mississippi which the ward had exchanged with the guardian for these western

. It is well to understand how the parties approached other in the negotiations preliminary to the treaty of

w, in accordance with these desires of the United States pressed in this preamble, desires of the guardian made n to the ward, the treaty reads:

ie Choctaw Indians do hereby absolutely and forever laim and relinquish to the United States all their , title and interest in and to any and all lands west of 100th degree of west longitude; and the Choctaws Chickasaws do hereby lease to the United States all portion of their common territory, west of the 98th ee west longitude, for the permanent settlement of the hita, and such other tribes or bands of Indians, as the ernment may desire to locate therein; excluding, how- , all the Indians of New Mexico, and also those whose l ranges at present are north of the Arkansas river, whose permanent locations are north of the Canadian r, but including those bands whose permanent ranges outh of the Canadian or between it and the Arkansas; h Indians shall be subject to the exclusive control of United States, under such rules and regulations not in- istent with the rights and interests of the Choctaws Chickasaws as may from time to time be prescribed by President for their government. Provided, however, the tory so leased shall remain open to settlement of Choc- and Chickasaws as heretofore. (See art. 9th of the y.)

ow, it is first to be observed that this article relates to two net tracts of land, but both included in one tract under cession of 1820: First, the tract lying west of the 100th ee of longitude, part of the tract ceded to the Choctaws er the treaty of October 18, 1820, and containing 9,440 acres.

s to this tract there is a relinquishment of all claim and . The Choctaws and the United States are the only ies. The Choctaws alone execute this deed of relin- shment. While the Choctaws alone appear as grantors

to the deed of relinquishment, yet the Chiskasaws were equitably entitled to one-fourth of the price paid for this relinquishment. The title was in the Choctaws, and they only could execute the deed, but the Chickasaws had one-fourth equitable interests. (See Chickasaw memorial to Congress 1890, p. 21, in Book of Documents A.) It was recognized in this treaty in the apportionment of the money paid for the relinquishment and the lease between the Choctaws and Chickasaws.

Then there is a second tract of land—a tract between the Canadian and Red rivers and west of the 98th degree of west longitude, and extending to the 100th degree of west longitude. It contained 7,713,239 acres. (See Jones' Report, p. 5, Senate Report No. 552, 52d Cong., 1st session.) The land concerning which this controversy arises is a part of this tract.

a.R. 189

The Choctaws and Chickasaws both jointly executed a lease of this tract to the United States for the settlement thereon of certain Indian tribes.

Such, then, was the character of the deed of relinquishment of the land west of the 100th degree of west longitude and such were the terms of the lease of the land between the 98th and 100th degrees of west longitude executed by the Choctaws and Chickasaws. Now, what did the United States pay for the relinquishment of the title to the first described tract to the Choctaws, and what did it pay for the lease of the second tract to the Choctaws and Chickasaws?

The United States did not pay a separate amount for the relinquishment of title to the vast body of land west of the 100th degree of west longitude, containing between six and seven millions of acres, but they paid one lump sum for relinquishment of title to this tract, and also for the lease of the tract between 98th and 100th degrees of west longitude. The amount paid was $800,000. The language of the treaty bearing on the consideration for the land described in the

eed of relinquishment and for the lease is in these words nd in the tenth article:

Article 10. In consideration of the foregoing relinquishment and lease, and as soon as practicable, after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and o the Chickasaws the sum of two hundred thousand dollars.

Here is a contract between a guardian and a ward, the ward wholly under the power of the guardian, and the guardian pays the ward $800,000 for a relinquishment of title to 6,589,440 acres, and for a lease of a tract of 7,713,239 acres, and this in the month of June, 1855. Why, the first tract at 12½ cents per acre, a most grossly inadequate price, would amount to $823,680, and it would leave not $1 to be applied to the payment of the lease for 7,713,239 acres, and under this lease this land has been held for nearly forty years. (See Jones' report, Senate Report No. 522, 52d Congress, 1st session, p. 5.)

A.R. 184

Counsel for the Government seek to show that in reality the Choctaws had no claim to the land west of 100°. It is too late to raise this question. The United States in the preamble express a desire that the Choctaws will relinquish this claim, and in the 9th article of the treaty they do actually relinquish this claim, and in the 10th article provision is made for the payment for the relinquishment. This right of the Choctaws has been thus recognized by the Government as a substantial right, and it is too late now to dispute it; but as to the real merits of the claim, we think we have heretofore clearly established it.

Now to return to the lease.

This was not a deed of cession. It was simply a lease. As the Court of Claims say, on pages 40 and 41 of their decision, pages 396 and 397 of Transcript of Record, "The land was not sold at all. The United States negotiated for a lease, and though perpetual in its character it was none the

less a lease. * * * Again it is argued there was no term fixed. This is true, but it rested upon a rental value. * * * Certain Indians were allowed to be located on it, to whom the lessors did not object; but other Indians to whom they did object were not to be located thereon. The land was inalienable without the consent of the lessors, which implied a future sale for their use. The lease must therefore be viewed as a mere permit, the premises remaining Choctaw and Chickasaw country, subject to special uses by the Government for other Indians."

Superintendent Neighbors, in his letter of February 1, 1855, had merely suggested opening negotiations for a tract of land lying on the east side of Red river, known as Cache creek, near the Wichita mountains. He did not suggest the acquisition of this tract either by deed or lease. But for some reason the Choctaws and Chickasaws were unwilling to cede. The preamble recites that the United States were desirous to make provision within the Choctaw country for permanent settlement of the Wichitas and certain other tribes or bands of Indians. They evidently had no home at this time. They were prairie Indians, says Superintendent Neighbors. They had no habitation recognized by the Government or by the Choctaws and Chickasaws or by any other Indian tribe. "They were without a local habitation and a name," for the name which they bore was a mere term of description applied by the Osages a few generations before (see report of Special Agent Townsend, p. 47; Ex. Doc. 13, 48th Cong., 1st session). Superintendent Neighbors said in his letter, "for the colonization of the Wichitas and such other prairie Indians as may be convenient to that location." The preamble then goes on to recite the purpose for which the Choctaws and Chickasaws are willing to lease on reasonable terms to the United States the tract described. It was clear, therefore, that the Choctaws and Chickasaws intended to retain and did retain the title to the tract and the right of property in the soil.

A.R. 109

Now this is made, if possible, still more manifest by first rticle of treaty of 1855, which we quote as follows: A.R. 24

Article 1. The following shall constitute and remain the oundaries of the Choctaw and Chickasaw country, viz: eginning at a point on the Arkansas river, one hundred aces east of old Fort Smith, where the western boundary ine of the State of Arkansas crosses the said river, and runing thence due south to Red river: thence up Red river o the point where the meridian of one hundred degrees west ongitude crosses the same; thence north along said meidian to the main Canadian river; thence down said river to ts junction with the Arkansaw river; thence down said iver to the place of beginning.

And pursuant to an act of Congress approved May 28th, 830, the United States do hereby forever secure and guarntee the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and uccessors, to be held in common, so that each and every nember of either tribe shall have an equal undivided interst in the whole: *Provided, however*, no part thereof shall ver be sold without the consent of both tribes, and that said and shall revert to the United States if said Indians and heir heirs become extinct or abandon the same.

This embraces the whole of the country described in the atent, includes the leased district, and, of course, the and in controversy as a part thereof. It is now described or the first time as Choctaw and Chickasaw country. It is new recognition of title under the act of Congress of May A.R. 40 8, 1830 (4th Stat., 411), now first mentioned in any of the reaties of the Choctaws, and it guarantees the lands within he limits named, not to the Choctaw or Chickasaw Nation, ut to the members of the Choctaw and Chickasaw tribes, heir heirs, to be held in common, so that each and every nember of either tribe shall have an equal and undivided nterest in the whole, provided, however, no part thereof and this, of course, includes the leased district and the land n controversy) shall ever be sold without the consent of oth tribes, and that said land shall revert to the United

States if said Indians and their heirs become extinct or abandon the same.

Here is a provision made for a future sale, in addition to the special guarantee of this land to the Choctaws and Chickasaws. Such a provision excludes the idea that the lease was to be so permanent that the lands could not be otherwise disposed of.

Now, for what purpose was the lease made? "For the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein." These are the same Indians whom Superintendent Neighbors describes as "the Wichitas and other prairie Indians." It is to be noted that he mentions the Wichitas as prairie Indians. The Choctaws and Chickasaws were particular as to who should be their neighbors. There was therefore inserted in the lease language both of exclusion and inclusion, language excluding certain Indians, and language specifically including certain other described Indians; so that it was declared that the tract was leased to the United States "for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein; *excluding*, however, all the Indians of New Mexico and also those whose usual ranges at present are north of the Arkansas river and whose permanent locations are north of the Canadian river, but *including* those bands whose permanent ranges are south of the Canadian or between it and the Arkansas; which Indians shall be subject to the exclusive control of the United States, under such rules and regulations not inconsistent with the rights and interests of the Choctaws and Chickasaws as may from time to time be prescribed by the President for their government. Provided, however, the territory so leased shall remain *open to settlement by* Choctaws and Chickasaws *as heretofore*."

Now, it will be seen that under this contract of lease the Government did not acquire the right to locate any Indians

might desire on this tract, but only such Indians as were
ceptable neighbors to the Choctaws and Chickasaws.
ho they were is clearly defined in the terms of the con-
ct. Secondly, it is clear that while the Indians located
accordance with this contract were to be subject to such
les and regulations as the Government might prescribe,
t it was provided that these rules and regulations were
t to conflict with the rights and interests of the Choctaws
d Chickasaws in said leased district; and, thirdly, not-
thstanding this lease and the rights acquired by the
ited States to settle certain Indians on said tract, it was
stinctly understood that the territory so leased should
main open to settlement by Choctaws and Chickasaws as
retofore—that is to say, that the right of the Choctaws and
ickasaws to settle in this district was in newise and in
manner to be abridged by the execution of this lease,
d it is a fact which must not be overlooked that the
octaws and Chickasaws were located in the leased district.
was, moreover, under the jurisdiction of the Choctaw
tion, as agreed upon at or immediately after the time of
severance of the governments of the two nations. (See
ticles 1, 2, and 3, treaty of 1855, 11 Stat., 611.)

We have already quoted article 1.

Article 2 of the treaty defined the Chickasaw district.
is was placed immediately west of the eastern district of
Choctaws and east of the 98th degree of west longitude.
The third article of the treaty then describes the Choctaw
trict, which is the remainder of the country held in common
the Choctaws and Chickasaws, which is the country de-
ibed in the first article, and which included the eastern
trict of the Choctaws and the leased district, and as the
ickasaw district lay between these two divisions, it is pro-
ded that the officers and people of the Choctaws shall at all
nes have the right of safe conduct and free passage through
Chickasaw district.

And the Choctaws proceeded to exercise government and

control over the leased district, in accordance with this third article of the treaty of 1855.

The constitution of the Choctaw Nation prescribes the following provisions:

A.R. 44

"For the convenience and good government of the people of the Choctaw Nation we do make, ordain and establish four districts, in this nation, to be known by the following names and boundaries, viz: Mosholatubbe district, Pushamataha district, Apuckshunnubbe district, and Hotubbe district. * * *

"The boundaries of Hotubbe district shall be embraced within the limits of the ninety-eighth and one hundredth degree of west longitude, and between Red river and Canadian river, known as leased land."

ARTICLE 4—JUDICIAL DEPARTMENT.

"Until Hotubbe district shall be duly organized and officers elected therein, under this constitution the supreme court shall be composed of three supreme judges, one to be chosen from the Apuckshunnubbe district, one from the Pushamataha district, and one from the Mosholatubbe district, one of whom shall be styled chief justice, and two of whom shall constitute a quorum to do business."

ARTICLE 7—GENERAL PROVISIONS.

"SECTION 1. Until Hotubbe district shall be duly organized the principal chief of the Choctaw Nation shall exercise such authority *over the citizens of the nation living in that district* as he may deem expedient for the protection of person, life, and property" (Choctaw Laws, 1869; Constitution of 1861, pp. 7, 8, and 13).

It is clear, therefore, from the treaty of 1855 not merely that the territory known as the leased district remained open to settlement by the Choctaws and Chickasaws as the right existed previous to that treaty, but that the said leased district, by the third article of the treaty, was made a part of the Choctaw country. It is clear, too, from these pro-

sions that it was made subject to the Choctaw government and that citizens of that nation lived in that district. It was not merely, therefore, owned by the Choctaws and Chickasaws under the treaty, but clearly was in the actual occupation of Choctaw citizens and had been settled by Choctaws and Chickasaws.

Besides, if we examine the respective interests of the two nations we must see that the leased district necessarily formed a part of the Choctaw country. The recognized division of their interests was that the Chickasaws held one-fourth and the Choctaws three-fourths. The eastern district of the Choctaws contained 6,688,000 acres, the Chickasaw district 4,650,935 acres, and the leased district 7,713,239 acres, making a total of 19,052,174 acres. It is only by assigning the leased district to the Choctaws that we can give them the three-fourths interest to which they are entitled. The leased district and the eastern district together amount to 14,401,239 acres, which approximately form the three-fourths interest which they have a right to claim; but if we leave out the leased district, their proportion is about 6 to 4 instead of 3 to 1.

It is clear, therefore, that the district known as the leased district was, under the treaty of 1855, leased by the Choctaw and Chickasaw Nations for certain special purposes therein mentioned; that it nevertheless remained Choctaw and Chickasaw country, open to settlement by Choctaws and Chickasaws; that it was a part of the Choctaw district, subject to its government, and occupied by its citizens, placed under the special protection of the principal chief of the Choctaw Nation, and continuing open to settlement by Choctaws and Chickasaws under the treaty of 1855 as it had been prior to that time.

Most unquestionably the leased district was owned and occupied by the Choctaw and Chickasaw Nations.

In a few years war broke out between the North and South. The five civilized nations were originally from the South. Many of these Indians—a great many of them were slave-holders—allied themselves with the South, their sympathies being naturally with the South in that great struggle. Many of them afterwards alleged that they at the time were without governmental protection. Mr. Cooley, Commissioner of Indian Affairs, in his report for 1865, pages 38 and 40, explains this want of governmental protection. To a very large extent they joined their fortunes with the South and fought on the side of the Confederacy during the war. Congress on the 5th of July, 1862, passed an act (12th Statute, 528 ——) providing that in case where the tribal organization of any Indian tribe shall be in actual hostility to the United States the President is hereby authorized to declare all treaties with such tribes to be abrogated if, in his opinion, the same can be done consistently with good faith and legal and national obligations.

This power was never exercised by President Lincoln and the treaties remained in full force (Report 262, part 2, House of Representatives, 50th Congress, 1st session, Book of Doc. B). Whatever the motive in permitting the obligations of Indian treaties to remain in effect, the fact cannot be obscured that the close of the war found every obligation with the civilized tribes unimpaired, just as if they had not taken up arms against the Government. (See Decision of Court of Claims, p. 50; Transcript of Record, pp. 398 and 399.)

RECONSTRUCTION.

We have seen that the Indian Territory had been appropriated for Indians, mainly for the five civilized tribes.

The war closed. It became necessary to rehabilitate these tribes. There were many Indian tribes from Kansas and elsewhere who had to be provided with reservations and homes. Slavery was abolished in the Indian Territory. Provision had to be made for these freedmen among the five civilized tribes. (See decision of Judge Parker in U. S. *vs.* Payne, decided at Fort Smith, Ark., May, 1881, annexed as Exhibit W, Report No. 3147, H. of R., 51st Congress, 1st session, No. 1, Book of Doc. B; also 2 McCrary, 290.) The necessities of the situation demanded more land for these tribes from Kansas and elsewhere and for the freedmen.

As early as 1864 the Commissioner of Indian Affairs, anticipating these necessities, in his annual report, page 34, had said: A.R. 240

"*I cannot too strongly urge the importance of preserving the Indian country (the Indian Territory) for the use of Indians alone, and in all treaties or other arrangements which may hereafter be made with its former owners insisting upon, and if need be, enforcing such terms, as will secure homes within that country for all such tribes, as from time to time it may be found practicable and expedient to remove thereto.*"

Says Judge Parker, in 2d McCrary, 290: — - - A.R. 68

"It is a matter of public history, that a number of tribes, which have been moved to the Indian country (since 1866) taking advantage of the embarrassment of the Government growing out of the war of the rebellion, had gone on the war path.

"The Government was desirous of securing peace with them, and of settling them upon reservations, where they could be civilized.

"Then, again, the white people in other localities were pressing on other tribes and demanding their removal. To

get them out of the way of the white settlements, and to locate them where they would be free from intrusion by the whites, they were removed to the Indian country (Indian Territory)."

Again he says:

"We find that the colored people were held in slavery in all the civilized tribes of the Indian Territory. The Government was desirous of protecting these freedmen, and securing them homes. It was feared that prejudice growing out of their former conditions as slaves and of race would be so strong against them that they would not be protected by the Indians. The Government had given them the boon of freedom, and it was in duty bound to secure it in all that the term implied to them. The Government feared *that to do this* it *might be necessary to settle them in a colony by themselves.* This purpose of the Government, *should it become necessary*, was manifested by the terms of the Choctaw treaty of April, 1866."

Judge Parker says further on the provision did not apply to colored persons who had been held in slavery elsewhere than in the Indian Territory.

"Henceforth it became the policy of the Government not to confine the Indian Territory to the five civilized tribes, but to locate in said Territory *other Indian tribes*, without regard to their previous abodes, and to make suitable provision for the freedmen of the five civilized tribes, as might become necessary."

This new policy led to

NEGOTIATIONS IN 1865 WITH THE FIVE TRIBES AND OTHER INDIANS.

The President appointed a commission to meet representatives of the different tribes. On that commission were D. N. Cooley, Commissioner of Indian Affairs; Hon. Elijah Sells, superintendent of the southern superintendency of Indians; Gen. W. S. Harney, of the United States Army, and Col.

y S. Parker, of General Grant's staff. The council as-
mbled at Fort Smith, Arkansas, September 8th, 1865, and
ntinued in session twelve days. Representatives of the
erokees, the Creeks, Seminoles, Choctaws and Chickasaws
ere in attendance.

The Osages, Senecas, Shawnees, Quapaws, Wyandottes,
ichitas, and Comanches were also represented (p. 34, A.R. 155
eport of Commissioner of Indian Affairs for 1865).

Those who were present on the part of the Choctaws and
hickasaws at the commencement of the conference were
yal Choctaws and Chickasaws; for it must be remem-
ered that the Indians of the five tribes, as well as other
ndian tribes, were divided into two classes—those who were
yal and those who had been disloyal to the Government.
t the commencement of the conference, on the 8th of Sep-
mber, the disloyal Indians had not arrived. United States
ndian agents were also present representing Osages, Qua-
ws, Senecas, Shawnees, Cherokees, Creeks, Seminoles,
octaws, Chickasaws, and also a United States agent rep-
senting the Wichitas and other affiliated bands.

In the first address which President Cooley delivered at
e opening of the conference he expressed the hope that
e dissensions which existed among them would be healed,
d that they would become a united people (p. 297).

The report of the Commissioner (Report of Commissioner
Indian Affairs 1865, p. 34) then proceeds: A.R. 155

Immediately upon the opening of proceedings the tribes
ere informed generally of the object for which the
mmission had come to them; that they, for the most part
tribes, had by violating their treaties, by making treaties
th the so-called Confederate States, forfeited all rights
der them, and must be considered *as at the mercy of the*
overnment; that there was every disposition to treat them
iently, and above all a determination to recognize in a
qual manner the loyalty of those who had fought upon
e side of the Government, and endured great sufferings
its behalf. On the next day the delegates were informed

that the commissioners were empowered to enter into treaties with the several tribes, upon the basis of the following propositions:

1st. That each tribe must enter into a treaty for permanent peace and amity among themselves, each other as tribes, and with the United States.

2d. The tribes settled in the Indian country to bind themselves, at the call of the United States, to assist in compelling the wild tribes of the plains to keep the peace.

3d. Slavery to be abolished, and measures to be taken to incorporate the slaves into the tribes, with their rights guaranteed.

4th. A general stipulation as to final abolition of slavery.

5th. A part of the Indian country to be set apart, to be purchased for the use of such Indians from Kansas or elsewhere, as the Government may desire to colonize thereon.

6th. That the policy of the Government to unite all the Indian tribes of this region into one consolidated government should be accepted.

7th. That no white person, except Government employés, or officers or employés of internal improvement companies, authorized by Government will be permitted to reside in the country, unless incorporated with the several nations.

We have three different reports of the proceedings of the council at Fort Smith. They are in the main alike, but here and there they differ somewhat in form, and in so important a matter we will present them as they appear in each form. The first form is as they appear in the report made by the Commissioner of Indian Affairs for 1865. The form just presented is as he states them on page 34 of his report as Commissioner. But Mr. Cooley was not only the Commissioner of Indian Affairs at the time, but he was a delegate to the Fort Smith council, and he was the president of that council. Accompanying his report as Commissioner of Indian Affairs is his report as president of the Southern Treaty Commission, which appears on page 296 *et seq.* of his report as such Commissioner. Also accompanying his report as Commissioner of Indian Affairs, on page 313 *et seq.* is a third report, entitled "Official report of the proceedings

G.R.159

he council with the Indians of the West and Southwest,
l at Fort Smith, Arkansas, in September, 1865."

his report is signed by Charles E. Mix as secretary.

he report as president of the Southern Treaty Commis-
will be found on page 298 of the Report of Commissioner
ndian Affairs for 1865. It is the same with the report
he official proceedings of the council, to be found on page
of the same report, with one exception, to which we will
et attention.

'he president of the council is reported as saying:

fter considering your speeches made yesterday, the
missioners have decided to make the following reply
l statement of the policy of the Government: Brothers,
are instructed by the President to negotiate a treaty, or
ties, with any or all of the nations, tribes, or bands in
Indian Territory, Kansas, or of the plains west of the
lian Territory and Kansas.

* * * * * * *

'he President is anxious to renew the relations which ex-
d at the breaking out of the rebellion. We, as repre-
tatives of the President, are empowered to enter into new
ties with *the proper delegates* of the tribes located within
so-called Indian Territory, and others above named, liv-
west and north of the Indian Territory.

ech treaties *must* contain substantially the following
ulations:

. Each tribe must enter into a treaty for permanent
ce and amity, with themselves, each nation and tribe, and
United States.

. Those settled in the Indian Territory must bind them-
es, when called upon by the Government, to aid in com-
ling the Indians of the plains to maintain peaceful rela-
ns with each other, with the Indians in the Territory,
l with the United States.

. The institution of slavery, which has existed among
eral of the tribes, must be forthwith abolished and meas-
s taken for the unconditional emancipation of all persons
d in bondage and for their incorporation into the tribes
an equal footing with the original members or suitably
vided for.

A.R. 166

4. A stipulation in the treaties that slavery or involuntary servitude shall never exist in the tribe or nation, except in punishment of crime.

5. A portion of the lands hitherto owned and occupied by you *must be set apart* for the friendly tribes *now* in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government.

6. It is the policy of the Government, unless other arrangements be made, that all the nations and tribes in the Indian Territory be formed into one consolidated government, after the plan proposed by the Senate of the United States in a bill for organizing the Indian Territory.

7. No white person except officers, agents, and employés of the Government or of any internal improvement authorized by the Government will be permitted to reside in the Territory unless formally incorporated with some tribe according to the usages of the band.

Brothers, you have now heard and understand what are the views and wishes of the President, and the commissioners, as they told you yesterday, will expect definite answers from each of you upon the questions submitted."

* * * * * * *

The president then stated that the agents will be supplied with printed copies of the address, and are requested to go with an interpreter to *their respective tribes* for the purpose of fully explaining what is said therein.

This shows that definitive treaties were not then expected to be made.

The only difference between this official report and that which appears on page 298 in Mr. Coolly's report as president of the Southern Treaty Commission is in the fifth stipulation, the word *now* being prefixed to the words "in Kansas and elsewhere" in the official report and omitted in the report of the president of the Southern Treaty Commission.

The fifth stipulation in the report of the president of the Southern Treaty Commission reads:

"A portion of the lands hitherto owned and occupied by you, must be set apart for the friendly tribes in Kansas and

ewhere, on such terms as may be agreed upon by the rties, and approved by the Government, or such as may be ed by the Government."

In the official report it reads:

"A portion of the lands hitherto owned and occupied by n, must be set apart for the friendly tribes *now* in Kansas d elsewhere on such terms as may be agreed upon by the rties, and approved by the Government, or such as may fixed by the Government."

It is clear that none of these three reports were steno-aphic reports, but we have incorporated each of them in ur brief, in order that the court may have them before it early and distinctly.

Gen. Paine, in his brief, p. 27 (p. 75 of Transcript of Record), ys:

"This address, in manuscript, in the Indian office, beas.a e following inscription:

"We propose to renew the treaty stipulations that existed revious to or at the breaking out of the rebellion, so far as gards the annuities.

"The Government will insist on purchasing a portion of eir lands for the settlement of friendly Indians."

This was unquestionably the understanding of the Com-issioner of Indian Affairs. (See fifth stipulation as stated him on page 34 of his report for 1865.) But while this as the understanding of Mr. Cooley, who delivered the ldress at the time, and as he understood it, it certainly uld not have been otherwise understood by the Indians whom it was addressed.

On behalf of the loyal Choctaws W. T. Patton and Robert Patton, they being the delegates then present, responded:

"In answer, therefore, to your propositions to the several ibes of Indians, we say that the first, second, third, fourth, fth and sixth articles meet our approval" (Ind. Com. Rep't 865, p. 320).

We call special attention to the third, fourth, and fif propositions:

The third and fourth propositions related to negroes fo merly held in slavery. The third proposition contemplate not merely that slavery should be abolished, but that mea ures should be taken to incorporate the slaves into the tribe with their rights guaranteed, or, as is elsewhere expresse in this proposition, page 298 of this report, they should b suitably provided for. It will be recollected that slaver existed among all the five civilized tribes of the Indian Te ritory, and that there were very large numbers of slave among the Choctaws and Chickasaws. As Judge Parke expressed it in the decision we have just quoted (2d Mc Crary, 290), the Government had given these slaves th boon of freedom, and it was in duty bound to secure it i all that the term implied to them. The fourth proposition provided for a stipulation as to the final abolition of slav ery—that is, that the abolition should be final and the in stitution never revived.

But the fifth proposition was the most important in the whole series. It was an absolute and unconditional re quirement that a part of the Indian Territory must be set apart for the colonization thereon of friendly tribes of In dians from Kansas and elsewhere. Without going into inquiry as to the terms upon which the land so set apart was to be acquired, it was to be acquired for the location thereon of friendly tribes now—at that time—in Kansas or elsewhere. It was in accordance with the policy recom mended by the Commissioner in 1864, page 34 of the Indian Report of that year:

"I cannot too strongly urge the importance of preserving the Indian country (the Indian Territory) for the use of In dians alone, and in all treaties or other arrangements, which may hereafter be made with its former owners, insisting upon, and if need be enforcing such terms as will secure homes within that country for all such tribes as from time to time, it may be found practicable and expedient to re move thereto."

The fifth stipulation was the mode provided for the enforcement of this long, carefully studied policy. It related to the colonization only of friendly tribes *now* in Kansas and elsewhere. This would have included not merely friendly tribes resident in Kansas, but other friendly tribes, who might happen to have been in Kansas at the time or elsewhere, thus including the Wichitas, who, according to their counsel, pages 55 and 56 of their brief in the Court of Claims, were not occupants of the leased district in 1866, having left there during the war, and not returning until 1868. Now, for all these various tribes of friendly Indians, whether in Kansas or elsewhere, homes were to be secured in the Indian Territory. But in whatever form the fifth proposition be stated, whether as stated by Mr. Cooley in his capacity as Commissioner of Indian Affairs, page 34 of his report, or as stated by him in his report as president of the Southern Treaty Commission, page 298, or as stated in the official report, page 319. There is one thing clear, distinct, and manifest, that the United States did not propose to acquire such land as they might acquire for any other purpose than the location of friendly tribes from Kansas and elsewhere on the land so acquired. So the United States commissioners declared and so the Indians with whom they proposed to treat must have understood them. This was one of the conditions on which they stated they were empowered to treat with the several tribes there assembled at Fort Smith—Cherokees, Creeks, Seminoles, Choctaws, and Chickasaws—all alike. This was the demand of the Government. It was acceded to by all these tribes alike, without discrimination, and upon this requirement all the subsequent treaties were made. Certainly the United States understood that the land to be acquired was not for any and every purpose, but only for the special purpose mentioned, and the Indians could not possibly have otherwise understood it.

The same propositions were for each tribe. There was

not a proposition of one kind to the Cherokees and anothe
and a different proposition for the Choctaws and Chicka
saws. These seven propositions were to be the basis of al
the treaties with all the tribes. Now, here was the Unite
States, the superior, the guardian, negotiating with the inferior
the ward. Under every principle of equity it was bound t
disclose to the inferior all that the ward ought to know in con
ducting such a negotiation. In the language of Presiden
Cooley's address to them, "*they were at the mercy of the
Government*" which was then negotiating with them. The
Government agents knew that these people had been in
duced to leave their ancient homes east of the Mississipp
and remove to a new and distant land, now occupied by them,
to get rid of the white man. Their main inducement for
removal had been to get rid of the white man's government,
and they had gone under the solemn assurance of the
Government—made in various treaties, to which we have
hitherto called attention—that they would be protected
from the intrusion of the white man and from any State or
Territorial government. It is utterly inconceivable that at
that time they would have parted with these lands for the
settlement of white men thereon. If the Government had
any purpose whatever to use these lands for the settlement
of the white man, it was bound, as a superior dealing with
an inferior, to have disclosed it. The Government did not
seek them for any such purpose, and the Indians—Chero
kees, Creeks, Seminoles, Choctaws, and Chickasaws alike—
never understood that they were to part with them for any
such purpose.

It certainly did not enter into the contemplation of the
parties that the country to be purchased from these Indians
under the treaties which should be made with them should
be used for any purpose other than the colonization thereon
of friendly tribes of Indians from Kansas or elsewhere, o
possibly, under cases of extreme necessity, Indian freedmen
whom the Government might desire to locate thereon. N

one could possibly have imagined that the lands so purchased were to be used for homestead or white settlement.

These propositions were considered for several days during the council. During one of the sessions the Choctaws and Chickasaws submitted their answer. They were the loyal Choctaws and Chickasaws, present upon invitation of the agent of these tribes. But they had not been appointed regularly under authority of acts of the legislatures of their nations. Upon some points the Chickasaws were not prepared to rely. The Choctaws present were willing to accept all the propositions except the seventh. As to the seventh proposition, the answer of the Choctaws and Chickasaws was substantially the same. They both desired that the seventh proposition should be so modified as to provide that no person of African descent, except their former slaves or free persons of color, who are now or have been residents of the territory, should be permitted to reside therein, unless formally incorporated with the tribe, according to the usages of the band (pp. 320, 321).

Before the close of the conference, on the 8th day of its session, the 16th of September, regular delegates from the Choctaw and Chickasaw Nations appeared. The Choctaw delegates had been appointed under an act of the Choctaw Council, passed September 6, 1865. (See Choctaw Laws, edition of 1869, p. 405.) I presume a similar act had passed the Chickasaw council. When they arrived, what was known as the preliminary treaty of peace was under consideration. This was a treaty prepared under the first of the seven propositions. It read: "That each tribe must enter into a treaty for permanent peace and amity among themselves, each other as tribes, and the United States."

Commissioner Parker, of the United States commission, had said to the conference (p. 327, Report of Commissioner of Indian Affairs, 1865): "This treaty of peace is an essential preliminary to the adjustment of any and all questions and interests under any old treaty." It can be found on

pages 330 and 331. It had already been signed by the loyal Choctaws and Chickasaws, who had been present at the commencement of the conference.

On the ninth day of the conference the regularly appointed delegates of the Choctaws and Chickasaws signed this treaty of peace (p. 346).

On the same day Commissioners Sells and Parker were appointed to confer with committees of the Choctaws and Chickasaws in relation to the *subject-matter* of additional treaties (p. 347).

This was the extent of their authority, according to the official report. They do not seem to have had authority to negotiate a treaty. The Choctaw delegates clearly had not (Choctaw Laws, edition of 1869, p. 405). Nevertheless the United States commissioners prepared a treaty which was an embodiment of their views.

On the 12th day, the last day of the session, President Cooley announced that the United States commissioners had prepared a treaty—that is, an additional treaty—for the consideration of the Choctaw and Chickasaw delegations, which they proposed to submit to them.

On the same day, being the last day of the session, Commissioner Parker announced, just before adjournment, that the commissioners had considered certain modifications of the proposed treaty, which had been submitted by the Choctaws and Chickasaws, but which he said the commission had declined to entertain.

We have no record of the modifications suggested; but we have the draft of the unsigned treaty. It can be found in Choctaw Laws, edition of 1869, p. 410. We have also in the report of Commissioner Cooley (Report of 1865, p. 36) a statement concerning this treaty. He says with the Choctaws and Chickasaws a treaty was agreed upon, upon the basis of the seven propositions heretofore stated, and in addition to which those tribes agreed to a thorough and friendly reunion among their own people, and forgetfulness of past

A.R. 151

reuces; to the opening of the leased lands to the settle-
t of any tribe, whom the Government of the United
es may desire to place thereon, and to the cession of one-
d of their remaining area *for the same purpose*; the United
es to restore these tribes to their rights forfeited by the
ll'on. This treaty, after its approval by the councils of
Choctaws and Chickasaws, is to be signed in this city by
e delegates from each nation sent here for that purpose.
he commission was mistaken in reporting that the treaty
agreed upon. The evidence discloses it was not ulti-
ely executed. (See decision Court of Claims, p. 53; Rec-
, p. 402.) The Indians present disclaimed any authority
nter into such a treaty. But this treaty shows clearly
t the commissioners understood by the seven proposi-
s, and especially as regards these leased lands. It will
ecollected that under the ninth article of the treaty of
5 these lands had been leased to the United States for
purpose of locating thereon certain tribes, especially
tioning certain tribes. Clearly these lands were held
rust for this purpose. So far as these lands were con-
ed, the Government simply desired an enlargement of
trust.

he fifth proposition required that "a portion of the lands
ed and occupied by you must be set apart for the
ndly tribes now in Kansas and elsewhere." Under the
th article of the treaty of 1855 many of these tribes
e excluded from these leased lands. The commissioners,
arrying out the fifth stipulation, demanded an enlarge-
t of the trust and proposed to incorporate into this un-
ed treaty the fifth article, which reads as follows:

The Choctaw and Chickasaw tribes agree to a modi-
tion of the ninth article of the treaty concluded in the
of Washington the 22d of June, A. D. 1855, by which
agree that all that portion of their common territory,
t of the 98th degree of west longitude, leased to the
ted States, may be used for the permanent settlement of
Wichita, and such other tribes or bands of Indians as

the Government may desire to locate thereon, without ex-
ception or restriction as to the character of the tribes."

Now, as we shall hereafter see, these lands were the only lands acquired from the Choctaws and Chickasaws under the treaty of 1866.

"There is nothing in the record," as remarked by the Court of Claims (page 55 of its decision and page 403 of Transcript of Record) "to indicate that the Choctaws and Chickasaws had any information as to the purpose of the Government except as embraced in the fifth proposition and the fifth article of the unsigned treaty submitted at Fort Smith. These gave the Indians to understand that the purpose was only to extend the rights of the United States in the land beyond the treaty of 1855, and this purpose was also understood by the United States." So much concerning the lands embraced in the leased district, and it is a portion of the leased district which constitutes the subject-matter of controversy in this case.

Article 4 of the unsigned treaty related to making provision for the settlement of friendly Indians from Kansas and elsewhere east of 98° upon such terms as may hereafter be agreed upon by the respective parties and approved by the Government. But this related to other lands than the leased district. It was additional land to be provided for Indians. But this article was not consummated by the treaty of 1866, as we shall hereafter see, it being made dependent upon the assent of the Choctaw and Chickasaw legislatures by the eleventh article of the treaty of 1866. It then became a conditional enlargement of the areas for Indian purposes; but as to the purpose, Mr. Cooley tells us on page 36 of his report, of the opening of the leased district to the settlement of any Indian tribes whom the Government may desire to place thereon—and this (proposed additional cession east of 98° was for the same purpose—that is, all the lands acquired were for the settlement of Indians thereon.

We submit herewith a copy of this unsigned treaty.

DRAFT OF TREATY SUBMITTED BY THE UNITED STATES COMMISSIONERS AT FORT SMITH. (NOT SIGNED.) A.R. 151

Articles of agreement and convention between the United States and the Choctaw and Chickasaw tribes of Indians, made and concluded at Fort Smith, Arkansas, the — day of September, A. D. 1865, by D. N. Cooley, Elijah Sells, Ely S. Parker, and Thomas Wistar, commissioners on the part of the United States, and the delegates of the Choctaw and Chickasaw tribes of Indians, signing this instrument.

Art. 1. Peace and friendship are hereby firmly established between all the citizens of the United States and all the individuals comprising the aforesaid tribes; and all the friendly relations that existed between them before the rebellion, shall be and the same are hereby renewed.

Art. 2. The Choctaw and Chickasaw tribes of Indians do hereby bind themselves to use their influence, and whenever called upon by the Government to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians of the Territory and with the United States.

Art. 3. The Choctaw and Chickasaw tribes of Indians, hereby admit, that the institution of slavery is abolished, and that slavery or involuntary servitude shall never hereafter exist in either tribe, except in punishment of crime, whereof the party shall have been duly convicted, and they promise and agree that measures shall be immediately taken by their respective national councils, to properly provide for such emancipated slaves as may have belonged to the members of the respective tribes; such provision to be subject to the approval of the President of the United States.

Art. 4. The Choctaw and Chickasaw tribes of Indians, hereby agree to open their country to the settlement of friendly Indians from Kansas and elsewhere, *upon such terms as may hereafter be agreed upon* by the respective parties and approved by the Government, and the Government may settle such friendly Indians on a portion of said Territory east of the ninety-eighth degree of west longitude, not necessary for the use of said Choctaw and Chickasaw tribes, as it

may desire, not exceeding one-third of the whole remai
Territory, for a fair and equitable consideration, to be
by the Government.

Art. 5. The Choctaw and Chickasaw tribes agree
modification of the 9th article of the treaty concluded a
city of Washington, the 22d day of June, A. D. 185
which they agree that all that portion of their commo
ritory west of the ninety-eighth degree of west longi
leased to the United States, may be used for the perma
settlement of the Wichita and such other tribes or ban
Indians as the Government may desire to locate ther
without exception or restriction as to the character of
tribes.

Art. 6. The Choctaw and Chickasaw tribes of Ind
promise and agree to submit and recommend, at the
meeting of their respective general councils, the adoptio
the plan proposed in the Senate bill 459, 38th Congres
session, to provide for the consolidation of the Indian tri
and to establish civil government in the Indian Territo
it being understood to be the settled policy of the Gov
ment of the United States that all the nations and tribes in
Indian Territory be formed into one consolidated gov
ment, after the plan proposed in the bill above referred
adopted by the United States Senate, 1865, the Governm
of the United States reserving said right.

Art. 7. The United States, in the event of the adoption
the Choctaw and Chickasaw and other Indian tribes of
Government proposed to be established in the Indian Te
tory, referred to in the preceding article, promise and ag
that no white person except officers, agents, and emplo
of the Government, and of any internal improvement
thorized by the Government, will be permitted to go i
and settle in said Territory, unless formally incorpora
and naturalized into one of the resident tribes, according
their laws, customs and usages.

Art. 8. The Choctaw and Chickasaw tribes of India
anxious for the restoration and preservation of kind
friendly feelings among themselves, do hereby declar
general amnesty of all past offenses, either against th
government or the Government of the United States,
no Indian or Indians shall be proscribed, or any act of
feiture or confiscation passed against those who may h
remained friendly and loyal to the United States, but t

shall all enjoy equal privileges with other members of said tribes.

Art. 9. The United States hereby promise and agree to restore the Choctaw and Chickasaw tribes of Indians to all their rights and privileges in lands and annuities, that they were possessed of, and entitled to, and they shall be applicable to the same objects as existed at the breaking out of the rebellion, except such part or parts of annuities and moneys as have been expended by the President in providing for the relief of destitute Indians, who were reduced to want on account of their friendship to the Government of the United States, which shall not be refunded.

Art. 10. It is hereby mutually agreed, that all of the provisions of the treaty of June 22d, 1855, between the United States and the Choctaw and Chickasaw tribes of Indians not inconsistent with the foregoing articles are hereby adopted and made a part of this instrument.

Art. 11. The Choctaw and Chickasaw tribes of Indians expressly agree, that any amendment to this treaty, which the Senate of the United States may make, shall be taken and held as a part of the same, and as binding in every respect as if it had, after being made, been formally submitted to and ratified by such parties.

Laws of the Choctaw Nation, p. 410 *et seq.*

The council adjourned on the 21st of September, 1865, subject to the call of the Secretary of the Interior.

This draft was nothing more than a submission of a series of propositions, through the delegates of the Choctaws and Chickasaws then present, to be transmitted by them for the consideration of the Choctaw and Chickasaw councils and as information to them of the basis on which it was proposed by the United States to make a new treaty and upon which the Choctaw and Chickasaw councils acted when they authorized their delegates to come to Washington for the purpose. It was submitted on the 12th and last day of the conference, and shortly before its adjournment. Manifestly, it could not have been expected to be concluded at that time; but had it been complete in all essential parts and had there been ample time for its consideration, the

delegates present were entirely without authority to negotiate a treaty of any such scope and character. Even the United States Commissioners Parker and Sells were only appointed to confer with committees of the Choctaw and Chickasaw delegates in *relation to the subject-matter* of additional treaties (Report of Commissioner of Indian Affairs 1865, p. 347). I have no copy of the acts under which the Chickasaw delegates were appointed. I presume, however, as I have already stated, they have been appointed under an act similar to the act of the Choctaw council. They were tenants in common so far as the leased district was concerned, and their rights and interests were to a great extent in common; but the powers of the Choctaw delegates were expressly limited by the act already cited (Choctaw Laws, edition 1869, p. 405). Under that act they were empowered simply to meet the commissioners of the United States for the purpose of negotiating a treaty of peace, and in the event they succeeded in negotiating such a treaty they were immediately to submit the same to the general council of the Choctaw Nation. They had succeeded in negotiating such treaty and had signed the same. Their powers were now exhausted. Any modifications which they might have suggested were therefore mere suggestions of theirs as private citizens. All they could do was to take this draft home with them and exhibit it to the council of their nation as a series of propositions for its consideration. Confirmatory of this is the evidence of General Bussey, filed in this case, who was in command at Fort Smith at the time the conference was held there in September, 1865.

8 Q. Did the commissioners, with your knowledge, reach any agreement as to the main points to be embraced in the proposed treaty between the United States and the Indian nations?

Ans. The council reached an agreement, so far as a treaty of peace was concerned, but the Indians there present disclaimed authority to enter into any specific agreement about

ag else, and asked time to report to their people, say-
t when they did so commissioners would be appointed
e further treaty. That, I believe, was the final agree-
eached.
Record, p. 47.

United States commissioners did not expect at this
nce at Fort Smith to conclude treaties with any of
es embracing all seven of the propositions which had
here submitted. The president of the commission,
oley, at the close of his address on the second day, in
the seven propositions were set forth, had said:

agents will be supplied with printed copies of the
s, and are requested to go with an interpreter *to their*
ve tribes for the purpose of fully explaining what is
erein.
Page 319, Ind. Com. Report, 1865.

from the whole proceedings and from the unsigned
it is manifest "that the whole land to be acquired was
equired for one and the same purpose, and that pur-
is the settlement of Indians on the lands to be ac-
without opening any of it to white occupation under
eral land laws of the United States."
draft of the unsigned treaty followed, says the Court
us (p. 54 of the decision, p. 403 of the Transcript of
cord), the submission of the seven propositions. In
e commissioners for the United States evidently under-
express their meaning of the propositions previously
ted. If the contention of the counsel of the defend-
to the precise language used be correct, the fifth
tion was a demand that the treaty was to be so framed
gard to the lands "that a portion of them *must* be
rt for friendly tribes." The fifth article of the un-
treaty provides that all the lands of the leased dis-
ay be used by the United States without exception or
ion as to the character of the tribes; and as the com-

missioners submitting the ultimatum understood it, doubtless the Choctaws and Chickasaws also understood it.

At the time the council at Fort Smith was held the affairs of the five tribes were in a most unsettled condition. Many of them were wanderers from their homes. Many of them had been in the service of the Confederate States. They were entirely ignorant of the policy which the Government would pursue towards them. There were large numbers of freedmen—their former slaves—resident among them. Census Bulletin No. 25, of the census of 1890, shows now a vastly greater number of persons of African descent in proportion to the Indian population among the Choctaws and Chickasaws than among the Cherokees, Creeks, and Seminoles. And even in the case of the Choctaws and Chickasaws there was a very great difference. While among the Choctaws the persons of African descent were about one-half of the Indians, among the Chickasaws the persons of African descent outnumbered the Chickasaw population. These facts greatly increased the difficulties of their situation, but in some cases the difficulties were more readily overcome than in others. After the conference at Fort Smith the Indians gradually returned to their homes, peaceful relations with the Government were maintained, the preliminary engagements of amity entered into by members of the tribes who were present at Fort Smith were faithfully adhered to, their councils were held and delegates were appointed to execute the final treaties of reconstruction. During the spring of 1866 these delegates repaired to Washington city.

THE TREATIES OF 1866.

The delegates came to Washington in pursuance of the council held at Fort Smith, where commissioners on the part of the United States had explained to them what would be required of them. A treaty was made with the Choctaws and Chickasaws April 28, 1866, with the Seminoles March

6, with the Cherokees July 19, 1866, and with the June 14, 1866. They were all proclaimed in July ust, 1866. The treaties were substantially the same, all of them were substantially the requirements set n the seven distinct propositions submitted at the held at Fort Smith in the previous month of Sep-, 1865. For the different treaties see Revision of Treaties, Choctaw and Chickasaw, p. 285, 14th Stat., eminole, p. 810, 14th Stat., 756; Cherokee, p. 85; p. 114, 14th Stat., 785.

proposition in reference to a cession of land for purposes is clearly intended in each one of these s. The sixteenth article of the Cherokee treaty pro-hat the United States may settle friendly Indians part of their Territory west of the 96th degree of west ide, on certain terms and conditions therein named. treaties with the five tribes were very similar. There ession of land in the case of the Creeks, the Seminoles, ioctaws, and the Chickasaws, and an agreement to the case of the Cherokees. (See art. XVI, Cherokee of 1866.)

third article of the Creek treaty reads:

A. R. 37

mpliance with the desire of the United States to locate ndians and freedmen thereon, the Creeks hereby cede nvey to the United States, to be sold to and used as for such other civilized Indians as the United States noose to settle thereon, the west half of their entire , * * * and in consideration of said cession, esti-to contain 3,250,560 acres, the United States agree to e sum of 30 cents per acre, amounting to 975,168

is not the same land which Mr. Cooley, in his report 5, p. 36, said was agreed to be ceded at the Fort Smith nce. He therein says that the Creeks agreed to cede use of friendly Indians from Kansas and elsewhere r lands north of the Arkansas river and one-half of

their lands south of that river. Why the change was m
is not explained.

The third article of the Seminole treaty reads:

a.R.37

In compliance with the desire of the United State
locate other Indians and freedmen thereon, the Semin
cede and convey to the United States their entire dom
In consideration of said grant and cession of their la
estimated at 2,169,080 acres, the United States agree to
said Seminole Nation, the sum of 325,362 dollars, said
chase being at the rate of 15 cents per acre.

The Choctaws and Chickasaws, under their treaty of 1
cede to the United States the territory west of the 98th deg
of west longitude, known as the leased district, being
same territory leased to the United States by the Choctaw a
Chickasaws, as hereinbefore mentioned under the treaty
June 22, 1855.

It will be recollected that under the 9th article of the tre
of 1855 this land had been already leased to the United Sta
for the permanent settlement thereon of certain tribes of
dians therein described and specially excluding other trib
It will also be recollected that at the Fort Smith council
1865, after the submission by the United States commission
of the seven propositions on which they were empowered
negotiate treaties with the Indian tribes—all the same pro
sitions being submitted alike to all the tribes—they submitt
what is known as the unsigned treaty to the Choctaw a
Chickasaw delegates, embodying their understanding of s
propositions, the fifth included, in which they required
modification of said ninth article of the treaty of 1855, so th
said leased land might be used for the permanent settlem
thereon of any Indian tribes as the Government might
sire to locate thereon, without exception or restriction as
the character of the tribes.

Now, a distinction is sought to be drawn between
Creek and Seminole treaties of 1866, and the Choctaw
Chickasaw treaty of that year, because the purpose of cess

is expressed in the former and not in the latter. Upon this point I cannot refrain from quoting what Judge Wilson said in reply in the Court of Claims to the counsel for the Government on this point: "Mr. Binney says the purpose is not expressed in the instrument—that is, in the treaty of 1866. He claims that since it is not so expressed, that is the end of the argument. I do not need to more than mention that an instrument may be a deed absolute on its face, yet a court of equity will decree it to be a mortgage, and for reasons too well known to need to be stated. And precisely the same principle must apply in this case, where the purpose of the conveyance was avowed, where no consideration was paid, and where the friendly Indians were paying nothing to anybody. But it is urged that, since it was expressed in the Seminole treaty and in the Creek treaty and not in the Choctaw and Chickasaw treaty, the principle above alluded to cannot apply. Why it cannot is not apparent. The preliminary negotiations were with all the Indians assembled at Fort Smith; at the same time, the propositions and demands of the Government were submitted to all alike, but the treaties were made separately, and there is no reason why it should have been left out of one and inserted in the other. There were *no new negotiations with the Choctaws by which any new or different purpose was suggested or agreed upon*, and therefore, since by express agreement everything must be construed most favorably to the Choctaws, and as every intendment or inference is to be in their favor, the conclusion must be that it was left out of this treaty by inadvertence. Mr. Binney in effect admits that the cessions in the Creek and Seminole treaties were *in trust*. And why? Because in those treaties it is expressed that it is in compliance with a desire of the United States to locate other friendly Indians and freedmen thereon. That made it a trust. That made it all right for the United States to pay the Creeks and Seminoles the value of their equity when that trust was violated; but he contends that it is all

wrong to pay the Choctaws anything, because there is such expression in the instrument by which their cess was made. If if had been it would be a trust, and t should be paid. That is the irresistible logic of his positi But whether it is so expressed or not can make no differe in equity, for we know what the intention was, and equ will respect and enforce the intention of the parties. A this is why Congress, representing the conscience of nation, after being fully informed, declared that it wa *trust*, and that the Choctaws have an equity, an equity are here asserting in this court. The soundness of thi unquestionable, and unless something can be found in way of facts or conditions that will take the case out of principle above asserted, this principle will be applied."

The five treaties were all made in compliance with same seven propositions, all alike, addressed to each of five tribes, for the same purposes, and in compliance w the same requirements.

Again, the Government pursues toward these five tri in their reconstruction the same policy as it had observ toward them the same policy under their treaties with the in their original location in the Indian Territory. The reconstruction treaties are, *in pari materia*, to be constru together, as forming one homogeneous system, so that ea of them explains and elucidates every other part of the co mon system to which they severally belong. Again quote Endlich on the Interpretation of Statutes, § 43, p.

On the 17th of October, 1865, an act was passed by t Legislative Assembly of the Choctaw Nation providing the appointment of commissioners to proceed to Washi ton city, at such time as may be agreed on with the co missioners on the part of the Chickasaw Nation, for t purpose of *completing* negotiations with the Government the United States commenced at Fort Smith, Arkansas, the 15th of September, 1865. The fifth section of the provided that no agreement into which the commission

entered should be binding until ratified by the general council of the Choctaw Nation (Laws of the Choctaw Nation, edition 1869, p. 420).

This act recognized that negotiations had been commenced, that they were in an incomplete state, and that the business of the delegates who were to be appointed was to complete the negotiations thus begun.

On November 18, 1865, the Chickasaw council passed a similar act providing for the appointment of delegates to visit Washington city during the next session of Congress to reconstruct or enter into new treaties with the United States of America (Constitution, Laws, and Treaties of the Chickasaws, Fort Smith, Ark., 1867, p. 100).

This brings us to a special consideration of the Choctaw and Chickasaw treaty of April 28, 1866, proclaimed by President Johnson July 10, 1866 (Revision of Indian Treaties, 285, 14 Stat., 769).

THE CHOCTAW AND CHICKASAW TREATY OF 1866.

a.R. 30

The treaty is so multifarious that it is almost impossible to present an analysis of it. It embraces no less than 51 articles, covering a great variety of subjects. As to the seven stipulations presented at Fort Smith, and which are required to be substantially incorporated in the treaties, the first and second are embodied in article 1 of the treaty. The third and fourth of these stipulations are in articles 2, 3, and 4; the fifth stipulation is in article 3; the sixth stipulation is in article 8, and the seventh in article 43.

The third article relates to the cession of the leased district for Indian purposes, and the third and fourth articles to the provisions to be made for freedmen of African descent. The fifth article relates to a general amnesty for past offenses as therein stated. The sixth article relates to granting the right of way to railroads which may be authorized to be constructed through the Territory. Article

8 relates to the establishment of an Indian territorial government in the Indian Territory, as provided for in the sixth stipulation at Fort Smith. Article 9 relates to educational purposes. Articles 10 and 45 relate to the reaffirmance by the United States of all their former obligations to the Choctaws and Chickasaws.

Commencing with article 11 and ending with article 37, both inclusive, and including all intervening articles, elaborate provision is made for a survey of all the Choctaw and Chickasaw lands east of the ninety-eighth degree, and division of the lands into severalty, with a right of selection first by the Choctaws and Chickasaws, then by Indians known by the general name of Kansas Indians, not exceeding ten thousand in number, and then after they have made their selections, as provided, by persons of African descent, mentioned in the third article of the treaty as therein provided. The whole scheme fell through, however, because it was made dependent upon the Choctaw and Chickasaw legislatures giving their assent to it, as was provided in the eleventh article, the first of the articles which related to the scheme, and this assent was never given. It has no connection with the fifth stipulation at Fort Smith: First, because that was an absolute requirement, whether as stated by claimants or defendants in this cause, and this scheme was conditional; and, second, because no such scheme was ever suggested in the fifth stipulation.

Article 38 defines who are members of the Choctaw and Chickasaw nations.

Articles 39 and 40 refer to trading purposes.

Article 41 relates to the competency of Choctaws and Chickasaws as witnesses.

Article 42 relates to the delivering up of criminals.

Article 43 relates to the exclusion of white men from the Indian Territory.

Article 44 to the establishment of post-offices.

rticle 45 I have already mentioned in connection with cle 10.

rticle 46 relates to an advance of money to Choctaws l Chickasaws.

rticle 47 relates to certain provisions concerning their ds and annuities, in the event that they request it, after ir lands have been assigned in severalty.

rticle 48 relates to payment of the Choctaw and Chicka- commissioners.

rticle 49 relates to awards to loyal Choctaws and Chicka- rs.

rticle 50 relates to payments to loyal citizens of the ited States for losses.

rticle 51 provided for an abrogation of all treaties and rts of treaties inconsistent with this treaty.

If the treaty of 1866 simply intended to provide for the solute and unqualified cession of the leased district, what s the necessity for incorporating so much matter in this aty? Why did it not provide for the cession of the district so much money and stop there? Certainly something e was intended by one party or the other or by both. In order that the rights and equities of the parties in erest may be determined, we invite the attention of the rt to the entire treaty, but we will quote certain articles ich we ask may be specially considered.

The third article of the treaty, which is the article of ces- n, reads as follows:

The Choctaws and Chickasaws in consideration of the sum hree hundred thousand dollars, hereby cede to the United tes the territory west of the 98th degree of west longitude, own as the leased district, provided, that the said sum ll be invested and held by the United States at an interest less than five per cent. in trust for said nations, until the islatures of the Choctaw and Chickasaw Nations respect- ly shall have made such laws, rules and regulations as y be necessary to give all persons of African descent ident in the said nations, at the date of the treaty of Fort

Smith, and their descendants heretofore held in sla
among said nations, all the rights, privileges and immuni
including the right of suffrage of citizens of said nati
except in the annuities, moneys and public domain, clai
by, or belonging to, said nations respectively; *and als*
give to such persons who were residents as aforesaid, and t
descendants, forty acres each of the lands of said nations, on
same terms as the Choctaws and Chickasaws to be selected on
survey of said land, after the Choctaws and Chickasaws
Kansas Indians have made their selections, as herein provi
and immediately on the enactment of such laws, rules, and r
lations, the said sum of three hundred thousand dollars, sh
be paid to the said Choctaw and Chickasaw nations, in
proportion of three-fourths to the former and one-fourth
the latter, *less such sum at the rate of one hundred dollars*
capita as shall be sufficient to pay such persons of Afri
descent before referred to, *as within ninety days after*
passage of such laws, rules, and regulations shall elect
remove, and actually remove from the said nati
respectively. *And should the said laws, rules,* and regu
tions not be made by the legislatures of the said nati
respectively, within two years from the ratification of t
treaty, then the said sum of three hundred thousand dol
shall cease to be held in trust for the said Choctaw and Chi
asaw nations, and be held, for *the use and benefit of such*
said persons of African descent as the United States shall
move from the said territory in such manner as the Uni
States shall deem proper; *the United States agreeing with*
ninety days from the expiration of said two years to remo
from said nations all such persons of African descent as m
be willing to remove; those remaining or returning af
having been removed from said nations to have no bene
of said sum of three hundred thousand dollars, or any p
thereof, but shall be upon the same footing as other citiz
of the United States in the said nations.

The fourth article, relating to suitable provision for t
negroes, in the case the survey provided for in the sub
quent part of the treaty is not made, reads as follows:

Article 4. The said nations further agree that all negr
not otherwise disqualified or disabled shall be competen
witnesses in all civil and criminal suits and proceedings

the Choctaw and Chickasaw courts, any law to the contrary notwithstanding; and they fully recognize the right of the freedmen to a fair remuneration on reasonable and equitable contracts for their labor, which the law should aid them to enforce. *And they agree, on the part of their respective nations, that all laws shall be equal in their operation upon Choctaws, Chickasaws, and negroes, and that no distinction affecting the latter shall at any time be made, and that they shall be treated with kindness and be protected* against injury; and *they further agree* that while the said freedmen now in the Choctaw and Chickasaw nations remain in said nations, respectively, they shall be entitled to as much land as they may cultivate for the support of themselves and families, in cases where they do not support themselves by hiring, not interfering with the existing improvements without the consent of the occupant, it being understood that in the event of the making of the laws, rules, and regulations aforesaid, the forty acres aforesaid shall stand in place of the land cultivated as last aforesaid.

We next call special attention to the following articles, providing for a survey of the lands east of 98 degrees. All the articles, from 11 to 37, inclusive, together with the intervening articles, relate to this survey. We quote what we think are necessary to a clear understanding of the proposed survey and of references to the same in other articles of the treaty:

Article 11. Whereas the land occupied by the Choctaw and Chickasaw Nations, and described in the treaty between the United States and said nations, of June the twenty-second, eighteen hundred and fifty-five, is now held by the members of said nations in common, under the provisions of the said treaty; and whereas it is believed that the holding of said land in severalty will promote the general civilization of said nations, and tend to advance their permanent welfare and the best interests of their individual members, it is hereby agreed that, *should the Choctaw and Chickasaw people, through their respective legislative councils, agree to the survey and dividing their land on the system of the United States*, the land aforesaid east of the ninety-eighth degree of west longitude shall be, in view of the arrangements here

inafter mentioned, surveyed and laid off in ranges, townships, sections, and parts of sections; and that for the purpose of facilitating such surveys and for the settlement and distribution of said land as hereinafter provided, there shall be established at Boggy Depot, in the Choctaw territory, a land office; and that in making the said surveys and conducting the business of the said office, including the appointment of all necessary agents and surveyors, the same system shall be pursued which has heretofore governed in respect to the public lands of the United States, it being understood that the said surveys shall be made at the cost of the United States and by their agents and surveyors, as in the case of their own public lands, and that the officers and employés shall receive the same compensation as is paid to officers and employés in the land offices of the United States in Kansas.

Article 12. The maps of said surveys shall exhibit, as far as practicable, the outlines of the actual occupancy of members of the said nations, respectively; and when they are completed, shall be returned to the said land office at Boggy Depot for inspection by all parties interested, when notice for ninety days shall be given of such return, in such manner as the legislative authorities of the said nations respectively, shall prescribe, or, in the event of said authorities failing to give such notice in a reasonable time, in such manner as the register of the said land office shall prescribe, calling upon all parties interested to examine said maps to the end that errors, if any, in the location of such occupancies, may be corrected.

It is seen clearly that the whole scheme of the proposed survey is dependent on the will of the Choctaw and Chickasaw people, expressed through their respective legislative councils. Without this expression of their will, there could be no survey. If this assent should be given and the survey made, then ninety days' notice was to be given, as provided for in article 12th. Then the 15th article provided:

Art. 15. At the expiration of the ninety days' notice aforesaid the selection which is to change the tenure of the land in the Choctaw and Chickasaw nations from a holding in common to a holding in severalty shall take place, when

every Choctaw and Chickasaw shall have the right to one quarter section of land, whether male or female, adult or minor, and if in actual possession or occupancy of land improved, or cultivated by him or her, shall have a prior right to the quarter section in which his or her improvement lies; and every infant shall have selected for him or her a quarter section of land in such location, as the father of such infant, if there be a father living, and if no father living, then the mother or guardian, and should there be neither father, mother nor guardian, then as the probate judge of the county, acting for the best interests of such infant, shall select.

Art. 25. During ninety days, from the expiration of the ninety days' notice aforesaid, the Choctaws and Chickasaws shall have the exclusive right of selection as aforesaid.

Art. 30. The Choctaw and Chickasaw Nations will receive into their respective districts, east of the ninety-eighth degree of west longitude, in the proportion of one-fourth in the Chickasaw and three-fourths in the Choctaw Nation, civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory, not exceeding ten thousand in number, who shall have in the Choctaw and Chickasaw Nations, respectively, the same rights as the Choctaws and Chickasaws, of whom they shall be the fellow-citizens, governed by the same laws and enjoying the same privileges, with the exception of the right to participate in the Choctaw and Chickasaw annuities and other moneys, and in the public domain, should the same, or the proceeds thereof, be divided *per capita* among said Choctaws and Chickasaws, and among others the right to select land as herein provided for Choctaws and Chickasaws, after the expiration of the ninety days during which the selections of land are to be made, as aforesaid, by said Choctaws and Chickasaws; and the Choctaw and Chickasaw Nations pledge themselves to treat the said Kansas Indians in all respects with kindness and forbearance, aiding them in good faith to establish themselves in their new homes, and to respect all their customs and usages not inconsistent with the constitution and laws of the Choctaw and Chickasaw Nations respectively. In making selections after the advent of the Indians and the actual occupancy of land in said nation, such occupancy shall have the same effect in their behalf as the occupancies of Choctaws and Chickasaws;

and after the said Choctaws and Chickasaws have made their selections as aforesaid, the said persons of African descent mentioned in the third article of the treaty shall make their selections as therein provided, in the event of the making of the laws, rules and regulations aforesaid, after the expiration of ninety days from the date at which the Kansas Indians are to make their selections as therein provided, and the actual occupany of such persons of African descent shall have the same effect in their behalf as the occupancies of the Choctaws and Chickasaws.

Article 31. And whereas some time must necessarily elapse before the surveys, maps, and selections, herein provided for, can be completed, so as to permit the said Kansas Indians to make their selections in their order, during which time the United States may desire to remove the said Indians from their present abiding places, it is hereby agreed that the said Indians may at once come into the Choctaw and Chickasaw Nations, settling themselves, temporarily, as citizens of the said nations, respectively, upon such land as suits them and is not already occupied.

Art. 37. In consideration of the right of selection hereinbefore accorded to certain Indians other than the Choctaws and Chickasaws, the United States agree to pay to the Choctaw and Chickasaw Nations, out of the funds of Indians removing into said nations respectively, under the provisions of this treaty, such sum as may be fixed by the legislatures of said nations, not exceeding one dollar per acre, to be divided between the said nations in the proportions of one-fourth to the Chickasaw Nation and three-fourths to the Choctaw Nation, with the understanding that at the expiration of twelve months the actual number of said immigrating Indians shall be ascertained, and the amount paid that may be actually due at the rate aforesaid; and should still further immigrations take place from among said Kansas Indians, still further payments shall be made accordingly from time to time.

The contention of the counsel for the Government is that the fifth stipulation, submitted to the Indians at Fort Smith, is fully complied with in articles 30, 31, and 37 of the treaty. Justice Peele, of the Court of Claims, takes the same view in his dissenting opinion; but both counsel and Justice

utterly ignore the fact that articles 30, 31, and 37 are
ly dependent upon articles 11 and 12, and also articles
125; indeed, all the articles of the treaty from 11 to
clusive, together with all intervening articles. Arti-
l to 37, inclusive, proposed a scheme of survey, under
the land east of 98 degrees was to be surveyed and
d into severalty; but this was not to be done unless
ioctaw and Chickasaw people through their legislative
ils gave their assent to such survey and such division
everalty.

fifth stipulation was an absolute and unconditional
rement of the five tribes—that a portion of the lands
rto owned and occupied by you *must be set apart* for the
dly tribes now in Kansas and elsewhere. But here
scheme of survey proposed of land east of 98°, under
, if it took place, Choctaws and Chickasaws were to
their lands in severalty after 90 days' notice (art. 12),
hen during 90 days thereafter (art. 25), and after the
ation of said 90 days these Indians—*not tribes*, but civ-
Indians *from the tribes*, generally known by the name
nsas Indians—were to be admitted as fellow-citizens of
ioctaws and Chickasaws, with the right to select land
ein provided for Choctaws and Chickasaws, and at
xpiration of 90 days from the date at which the
s Indians are to make their selections these persons
frican descent, mentioned in the third article of
reaty, are to make their selections, in the event
e making of the rules, laws, and regulations as
ded in the third article of the treaty. But, as we
is whole scheme of survey was dependent on the
of the legislative councils of the Choctaws and
asaws. It is utterly impossible that this scheme, con-
al on the assent of the Choctaws and Chickasaws,
l be in compliance with the unconditional require-
of the fifth stipulation. Besides the fifth stipulation
ed that the land set apart must be for friendly tribes.

This scheme under article 30 ~~merely~~ merely contemplated a settlement of Indians *from tribes* who were not to settle in their tribal capacity, but were to become fellow-citizens of the Choctaws and Chickasaws. The articles 11 to 37, inclusive, with intervening articles, are utterly and absolutely irreconcilable with the fifth stipulation submitted at Fort Smith. Any attempt to reconcile them must result in utter failure. The whole scheme was made dependent upon the assent of the Choctaw and Chickasaw legislative councils, and their assent never having been given, the whole scheme fell through, and all the articles of the treaty from 11 to 37, both inclusive, became utterly null and void.

I herein incorporate and call attention, in connection with these articles, to what General Paine says in his reply brief in the Court of Claims in reference to the charge of the defendant Indians that the fifth proposition submitted at Fort Smith was embodied in the fourth article of the unsigned treaty, and that this was rejected by the Choctaws and Chickasaws, and also to the contention of the counsel for the Government that the fifth proposition was virtually embodied in articles 30, 31, and 37 of the treaty of 1866. General Paine says:

4. In amplification of their objection to my eighth proposition, the counsel for the Wichitas repeat the erroneous assertion, that the Choctaws and Chickasaws rejected article 4 of the treaty submitted, for subsequent consideration, to the delegates, at the adjournment of the Fort Smith council of 1865, which article provided for the settlement of friendly Indians in their country east of the 98th meridian. They think that this article embodied the fifth of the seven Fort Smith propositions, and that its rejection left the cession of 1866 unaffected by that fifth proposition. On the other hand, the counsel for the United States contends that the substance of the fifth proposition was actually embodied in articles 30, 31 and 37 of the treaty of 1865.

The counsel are all mistaken. The fifth proposition was neither abandoned in the treaty of 1866 nor incorporated into articles 30, 31 and 37 of that treaty. It was, by impli-

, incorporated into the third article of the treaty. the representatives of the United States and of the aw and Chickasaw nations met, in council, at Wash-, in 1866, the Choctaws and Chickasaws did not reject urth article of the treaty submitted at the adjourn- of the Fort Smith council. As to this article, a com- ise was made by the parties. The article, submitted rt Smith, contemplated a definitive agreement, by the aws and Chickasaws, to admit friendly Indians to their ry east of the 98th meridian. But the agreement, was made at Washington, on this subject, was not a tive agreement. It was only a conditional agreement, was to be a part of the scheme embraced in sections 37, inclusive, of the treaty of 1866, and was not to effect before the occurrence of events, which never oc- d, viz., the decision of the Choctaw and Chickasaw atures to survey and divide their lands, and the com- on of the surveys and of the maps thereof. No provis- ontained in either of the 24 articles, 14 to 37, inclusive, took effect. So far as those articles are concerned, the is mere blank paper. /3

ither article 30, nor article 31, nor article 37, nor any article between the 13th and the 37th, was to become tive until (1) the Choctaw and Chickasaw legislatures decided to survey and divide the lands, (2) the surveys been completed, (3) maps of the surveys, including not the ordinary subdivision lines, but also, "*as far as icable, the outlines of the actual occupancy of members of id nations, respectively,*" had been completed and filed land office, and (4) notice had been given, for 90 days, the filing of the maps, "calling upon all parties inter- to examine said maps."

See article 11 of treaty of 1866.
Also article 11 of treaty of 1866.
Article 12 of said treaty.
Artiele 12 of said treaty.

neral Paine then quotes article 31 of the treaty already d by us and proceeds:

hat, then, was the meaning of the words "may at once into the Choctaw and Chickasaw nations"? Did they

mean that they might "come" as soon as the treaty was signed, on the 28th of April, 1866? Certainly not. Did they mean that they might "come" as soon as the treaty was proclaimed, on the 10th of July, 1866? Certainly not. The preceding words clearly indicate their meaning. They meant that when the Choctaw and Chickasaw legislatures should decide to survey and divide the Choctaw and Chickasaw lands east of the 98th meridian, these Kansas Indians might at once enter the land, without waiting two, three, or four years for the completion of the surveys, maps, and selections provided for. This article was so understood by the Government of the United States. The Choctaws and the Chickasaws did not decide to survey and divide their lands, and, *therefore, not a single Kansas Indian was located east of the 98th meridian.* But the counsel have discovered that the United States possessed the right to settle Indians east of the 98th meridian as soon as the treaty of 1866 was ratified, *and have waived its exercise for thirty years.*

But great stress is laid on the words "hitherto owned and occupied by you" in the fifth stipulation. We again quote the fifth stipulation from the official proceedings, p. 319, Indian Commissioner's Report, 1865.

"A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes now in Kansas and elsewhere."

The counsel for the Government contends that the lands east of 98° can only be included under the description "hitherto owned and occupied by you," the lands west of 98° having been leased to the United States Government by the treaty of 1855. This is equivalent to saying that the lands from which the portion to be set apart was taken must not only be owned, but actually occupied. The Choctaws and Chickasaws were as much the occupants as well as owners of the leased district at the time as they were of the far greater portion of the land east of 98°, as illustrated by General Paine in his Supreme Court brief (p. 36). The Chickasaw district, which is east of 98°, contains

,650,935 acres. But in 1866 the Chickasaws, including
ien, women, and children, numbered less than 4,650. There
ust have been at that time less than 1,500 Chickasaw fami-
es. If each family had occupied 500 acres, they would have
ccupied less than 750,000 acres, less than one-sixth of the
istrict. But in fact they must have occupied less than
ne-twelfth of the land. And yet, upon the assumption of
he counsel for the United States, the portion to be set
part for friendly Indians must be taken from the one-twelfth
hich they occupied, and not from the eleven-twelfths
hich they did not occupy.

The land west of 98°—known as the leased district—
as still owned by the Choctaws and Chickasaws. We have
en that it was defined as a part of the Choctaw and Chick-
saw country by the first article of the treaty of 1855, and
hat it was made a part of the Choctaw district by the third
rticle of said treaty, with free passage across the interven-
g district of the Chickasaws by Choctaws to and from the
ased district and the eastern Choctaw district, and that by
he ninth article of said treaty the said leased district re-
ained open to settlement by Choctaws and Chickasaws as
retofore.

This clearly showed that there had been settlements of
hoctaws and Chickasaws within the limits of the leased dis-
ict prior to 1855, and that the right of settlement therein
as to continue after the lease just as it had existed *prior*
reto. Under the Choctaw constitution of 1860 it had been
rganized into a political and judicial district of the Choc-
w country and its citizens placed under the special pro-
ction of the principal chief of the Choctaw Nation. We
ink, therefore, that the argument that the "lands hitherto
rned and occupied by you" apply only to the lands east of
e 98° of west longitude fails, the description applying
st as much to the leased district as to the land lying east
98°. It is certainly clear that the fifth stipulation is not

embodied in the provisions of the 30th, 31st, and 37th articles of the treaty.

According to counsel of defendant Indians in Court of Claims, the Wichitas were not in the leased district in 1866, having left there in 1862, and did not return until 1867. (Def't's Ind. Brief, p. 56).

The fourth article of the treaty was in compliance with the third proposition submitted at Fort Smith, requiring suitable provision to be made for the negroes, in case the survey was not made, and they allowed to make selection of land, as provided in article 30, after the Kansas Indians had made their selections. This provision was made for the negroes, but no similar provision was incorporated for the Kansas Indians.

In the event the scheme of survey had been carried out, the United States agreed to pay to the Choctaws and Chickasaws, out of the funds of the Indians removing, such sum as may be fixed by the legislatures of said nations, not exceeding one dollar per acre. (See article 37.) Now, the land of the leased district was contiguous to this land east of 98°. We may fairly conclude that at that time it was of equal value for Indian purposes. Even if the $300,000 provided for in the third article of the treaty of 1866 was intended as payment of the land, it must strike every fair and candid mind as a remarkable contention to hold that this was a just compensation for 7,713,239 acres.

The eighth article of the treaty of 1866 provided for an Indian council, consisting of delegates elected by each nation or tribe, lawfully resident within the Indian Territory, to be annually convened in said Territory, with elaborate provisions for an Indian government. It was in compliance with the sixth stipulation submitted at Fort Smith, which was in these words:

"It is the policy of the Government, unless other arrangements be made, that all the nations and tribes in the Indian Territory be formed into one consolidated government after

the plan proposed by the Senate of the United States, in a bill for organizing the Indian Territory."

If anything had been wanting to confirm the Choctaws and Chickasaws in ceding part of the lands to the United States, in the understanding that they were ceded in trust, as stated in the fifth stipulation, for the settlement of friendly tribes from Kansas and elsewhere, it would have been the insertion of these provisions in the treaty. But they already so understood, and these provisions simply confirmed that understanding. These Indians had all been told that they must surrender a part of their land for the location thereon of friendly tribes from Kansas and elsewhere, and now they were informed that it was the policy of the Government to consolidate all the Indian tribes in the Indian Territory, not only the five tribes already there, but the new tribes to be located on the lands which they ceded. How was it possible for the Choctaws and Chickasaws to conceive that they were ceding their lands absolutely to the Government to open them under the general land laws to white settlement?

We next call special attention to article 43 of the treaty, which relates to the exclusion of white persons from the Indian Territory. It reads as follows:

Art. 43. The United States promise and agree that no white person, except officers, agents, and employés of the Government, and of any internal improvement company, or persons traveling through or temporarily sojourning in, the said nations, or either of them, shall be permitted to go into said Territory, unless formally incorporated and naturalized by the joint action of the authorities of both nations into one of the said nations of Choctaws and Chickasaws, according to their laws, customs or usages; but this article is not to be construed to affect parties heretofore adopted, or to prevent the employment temporarily of white persons who are teachers, mechanics, or skilled in agriculture, or to prevent the legislative authorities of the respective nations from authorizing such works of internal improvement as they may deem essential to the welfare and prosperity of the community, or be taken to interfere with or invalidate

any action which has heretofore been had in this connection by either of the said nations.

This was in conformity with the seventh stipulation submitted at Fort Smith, which provided:

7. That no white person, except officers, agents and employés of the Government, or of any internal improvement authorized by the Government, will be permitted to reside in the Territory, unless formally incorporated with some tribe, according to the usages of the band.

It is clear that all whites except those excepted were to be excluded from the Indian Territory, the purpose being that the Indians were to remain outside of the presence and influence of the white man, and without any State or Territorial government, in accordance with the object of their original removal.

I next quote article 46. This relates to a loan to the Choctaws and Chickasaws, $150,000 to the former and $50,000 to the latter. It will be seen that this loan was amply secured. The Government could reimburse itself either out of the moneys which might become due to these nations, if any should become due under the provisions of the third article of this treaty, or out of the moneys which might become due on account of the admission of Kansas Indians east of 98 degrees, under the provision of the 37th article of the treaty; or, if these sources failed, then out of any other moneys of said nations in the hands of the United States. The last security in itself was ample, for the United States had in hand abundant funds of these nations out of which it could reimburse itself for this loan. (See Decision, pp. 56 and 57; Transcript of Record, p. 406.)

The condition put into this article for the repayment of the money was also made to depend upon the consent of the Choctaws and Chickasaws to the survey and dividing of their lands, and their agreeing to adopt their freedmen. The United States was unwilling to take any risks as to

r being done; hence the security required for the ad-
e of the sums mentioned in article 46. (See Decision,
; Transcript of Record, p. 420.)

t. 46. Of the money stipulated to be paid to the Choc-
and Chickasaws under this treaty *for the cession of the*
l district, and the admission of the Kansas Indians among
, the sum of one hundred and fifty thousand dollars shall
'anced and paid to the Choctaws, and fifty thousand
rs to the Chickasaws, through their respective treas-
, as soon as practicable after the ratification of this
y, to be *repaid out of said moneys* or any other moneys
id nations in the hands of the United States; the resi-
not affected by any provision of this treaty, to remain
e Treasury of the United States at an annual interest
ve per cent., no part of which shall be paid out as an
ity, but shall be annually paid to the treasurer of said
ns, respectively, to be regularly and judiciously ap-
, under the direction of their respective legislative
cils, to the support of their government, the purposes
ucation, and such other objects as may be calculated to
ote and advance the welfare and happiness of said
ns and their people respectively.

e now come to the consideration of the third article of
eaty of 1866, under which the cession was made of
is known as the leased district, and the only cession
ver which was made under the treaty.

e attempt has been made to construe this article as an
ute cession by the Choctaws and Chickasaws to the
d States of all their territory west of the ninety-eighth
e of west longitude, generally known as the leased dis-
for the consideration of $300,000. The article can be
nstrued only if we read the first clause in these words:
Choctaws and Chickasaws in consideration of the sum
ee hundred thousand dollars hereby cede to the United
, the territory west of the 98th degree west longitude,
n as the leased district." If we read only this much of
ticle, stopping with the word district, and absolutely
nating all the rest of the article, then and then only

2

would the article be susceptible of such construction
would confine us to the ceding clause of this artic
and all the rest of the article, as well as all the re
treaty, might be eliminated. It would have been
unnecessary to have passed the jurisdictional act to
gate and determine the rights and equities of the p
this construction is to be maintained. Such a cons
would not only be inequitable, but unconscionable.
are certainly not restricted to the ceding clause to a
the meaning of the parties to this treaty. The inte
gathered, says the Court of Claims, page 58 (Trans
Record, p. 407), from the words must control, and
tire instrument must be examined in order that
intention may be ascertained (1 Kent Com., 174; *Is*
140 U. S., 453; U. S. *vs.* Texas, 162 *th.*, 36). Con
the court says:

"Aside from the act which requires that everything
necessary by the court to aid in determining the q
presented, and tending to shed light on the cla
equities of the parties, the intent must be gathered
from the language of the instrument, but attend
surrounding circumstances may be resorted to as aid
ascertainment of the meaning and intent of the
(Decision, p. 58; Transcript of Record, p. 407).

The rule is established by abundant authority,
ordinary transactions between men standing on a
footing with each other, and where only *locus tides* is
to be observed between them, that parol evidence is
ble to show a resulting trust in a deed absolute on
or to show that an absolute conveyance is a conditio
(Babcock *vs.* Wyman, 19th How., 289, p. 300, citing
McLean, 1st John. Ch'y Rep., 582, where it is said t
sulting trust might be established by parol proof,
against the face of the deed, but in opposition to the
of the nominal purchasers denying the trust, and ev
the death of such purchasers; 4th Kent; 142, 4th K
where it is said there are resulting trusts implied
from the manifest intention of the parties and the

and justice of the case, and such trusts are expressly excepted from the operation of the statute of frauds).

In Russell *vs.* Southland, 12 Howard, 139, the court says, page 147:

"The question is whether this transaction was a mortgage or a sale. It is insisted on behalf of the defendants that this question is to be determined by inspection of the written papers alone, oral evidence not being admissible to contradict, vary or add to their contents. But we have no doubt extraneous evidence is admissible, to inform the court of every material fact known to the parties when the deed and memorandum were executed. This is clear both upon principle and authority."

The court further on say:

INADEQUACY OF CONSIDERATION.

"In examining this question it is of great importance to inquire whether the consideration was adequate to induce a sale. Where no fraud is practiced and no inequitable advantages taken of pressing wants, owners of property do not sell it for a consideration manifestly inadequate, and therefore, in the cases on this subject great stress is justly laid upon the fact, that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold" (numerous authorities cited).

In Peugh *vs.* Davis, 96th U. S., p. 336, the court say:

"In equity, where the court acts on the real character of the transaction, any evidence written or oral tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument, has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the objects of the parties in executing or receiving the instrument. The object of the parties will be considered by a court of equity. It constitutes a ground for the exercise of its jurisdiction which will always be asserted to prevent fraud or oppression, and to promote justice."

See also Brill *vs.* Brill, 98th U. S., 514; 15th Wall., 105; 107 U. S., 20.

We further quote here from General Paine's Supre
Court Brief, p. 5.

In Mead *vs.* Randolph, 8th Texas, 191, the court said

"It seems, then, now to be beyond question that pa
evidence is admissible to prove that a deed or instrume
absolute on its face, was executed and delivered upon a
tain trusts not reduced to writing, and which the grant
promised to perform, and that the same may be establishe

The court, after referring to Carter *vs.* Carter, 5 T. R
Stamper *vs.* Johnson, 3d T. R., and other cases, said th
although the question whether a deed absolute on its fa
was a mortgage had arisen oftener than the questi
whether such a deed was a deed in trust, the principle
both cases was the same.

The same rule obtains in reference to treaties.

Public treaties are to be interpreted like other laws an
contracts. Such is the inevitable imperfection and am
biguity of all human language that the mere words alone
any writing literally expounded will go a very little wa
towards explaining its meaning (Wheaton's International
Law, part 2, c. 2, s. 17).

Treaties of every kind are to receive a fair and liberal in
terpretation, according to the intention of the contracting
parties, and to be kept with the most scrupulous good faith
Their meaning is to be ascertained by the same rules o
construction and course of reasoning which we apply to th
interpretation of private contracts (1 Kent, Comm., 174).

To the same effect are the authorities quoted by the Co
of Claims in their decision, pp. 58, 59, and 60; Transcript
of Record, pp. 407, 408, and 409.

In re Ross, 140 U. S., 475, Justice Field, pronouncing th
opinion of the court, said:

"It is a canon of interpretation to so construe a law or
treaty, as to give effect to the object designed, and for that
purpose, all of its provisions must be examined in the light
of attendant and surrounding circumstances. To ascer

terms and expressions a literal meaning will be given, and to others a larger and more extended one. The reports of adjudged cases and approved legal treatises are full of illustrations of the application of this rule. The inquiry in all such cases is as to what was intended in the law by the legislature, and in the treaty by the contracting parties."

Thus justified by these authorities in the law, we have referred to the history of these tribes antedating this treaty of 1866, to the policy of the Government when they were first settled in the Indian Territory, to the change of policy announced in 1864, to the subsequent proceedings of the council at Fort Smith in 1865, and the negotiations which finally resulted in the execution of the treaties of 1866, followed up by an examination of certain sections of the treaty of 1866, to which we invited special attention, all for the purpose of ascertaining the intention of the parties in framing the treaty of 1866. We shall proceed now to examine not merely the balance of the third article of the treaty, but all subsequent history which will throw light in ascertaining the intentions and objects of the parties and in determining their rights and equities. These authorities certainly sustain the position that we must go beyond the ceding clause. The ceding clause is the first clause of the third article of the treaty of 1866. It is in these words:

"The Choctaws and Chickasaws in consideration of the sum of three hundred thousand dollars hereby cede to the United States, the territory west of the 98th degree west longitude, known as the leased district."

If we read, as we have already said, only this much of the article, stopping with the word "district" and absolutely eliminating all the rest of the article, then and then only would the article be susceptible of such a construction. But if we read the balance of the article we find that the language of the article following the word district is unconditionally repugnant to any idea whatever of an abso-

lute cession of this land for the consideration of three hundred thousand dollars. The two ideas, the absolute cession and the payment of the consideration of three hundred thousand dollars, co-exist together. If there was an absolute cession it was an absolute cession for and in consideration of three hundred thousand dollars. If no consideration of three hundred thousand dollars was paid for the land, then under the terms of this article there was no absolute cession of this land. Now, the subsequent part of the article shows that the three hundred thousand dollars was to be retained by the United States and held *in trust*. If the Choctaws and Chickasaws passed laws within two years conferring on persons of African descent, resident among them, all the privileges of citizenship, including the right of suffrage, which privileges carried rights of property, as the Indians hold lands in common, together with forty acres of land to be assigned to each of them, and the persons of African descent remained among them, then and only then the three hundred thousand dollars was to be paid to the Choctaws and Chickasaws. Manifestly this sum was not to be paid for the land. It was the consideration to be paid to the Choctaws and Chickasaws for the provision, including 40 acres of land to be assigned to each of them, herein required to be made for persons of African descent resident among them.

This provision for the rights of citizenship for persons of African descent, including the 40 acres of land for each of them, was the *sine qua non* for the three hundred thousand dollars. With this provision the three hundred thousand dollars went to the Choctaws and Chickasaws; without it the three hundred thousand dollars did not go to them. With this provision it was theirs; without it, it was not theirs. How, then, can it be said the three hundred thousand dollars was paid for the land? Again, how can the three hundred thousand dollars be said to be a payment for land west of the 98th degree when the United States insists

ion to conferring on all persons of African descent
among them, and their descendants heretofore held
ry, all the rights, privileges, and immunities, includ-
right of suffrage, of citizens of said nations, that said
n *shall have forty acres each of the lands of said nations*
me terms as the Choctaws and Chickasaws, to be selected
urvey of said land, after the Choctaws and Chickasaws
saw Indians have made their selection as herein pro-
which lands, so surveyed, were to be east of the 98th

t the amount originally advanced as a loan, and
he Choctaws received under the arrangement of
irly chargeable to the lands which the Choctaw freed-
e occupying and cultivating under the fourth article
y of 1866"?

purpose of this provision relating to the $300,000 was
ay for the land. Its object was to cover the cost of
oval of the freedmen.

* * * * * *

sum was fixed at $300,000 because it was estimated
ime that there were 3,000 freedmen, and it was
that each freedman, in case of removal, should re-
r expenses incident to emigration the sum of $100
Report 552, 52d Cong., 1st session, p. 11).

e freedmen did not remove, and the Choctaws and
saws conferred the privileges and assigned the forty
each of them, then they were to receive the $300,000,
for the land.

can it be said that a single dollar was ever paid for
l west of the 98th degree? It is true that they have
ived forty acres each east of the 98th degree, accord-
the survey, because the Choctaws and Chickasaws
sented to the survey; but they are allowed as much
they can cultivate, provided for them under the
rticle of the treaty, in the event the scheme of sur-
s not carried out.

But even if the Choctaws and Chickasaws complied with this provision, the whole three hundred thousand dollars were not to be paid to them unless all such persons of African descent remained among them. If any of such persons, within 90 days after the passage of such laws, removed from the said nation, then $100 *per capita* was to be deducted from the said sum of three hundred thousand dollars for such persons as might remove. Not a dollar was to be paid of said sum of three hundred thousand dollars in exchange for an acre of this leased district; but upon the happening of a second contingency, the failure of these nations to make the required provisions for persons of African descent within two years, then it was provided that the said sum of three hundred thousand dollars was no longer to be held for the Choctaws and Chickasaws, but was to be held in trust for the benefit of such of said persons of African descent as might remove from said nations within ninety days from the expiration of said term of two years.

But there was a third contingency in which the three hundred thousand dollars was to be held, neither for the benefit of the Choctaws and Chickasaws, nor for the persons of African descent resident among them. If these laws, rules, and regulations were not passed within the prescribed time, and if these persons of African descent remained among the Choctaws and Chickasaws or returned after having been removed from among them, they were to lose all interest in said sum of three hundred thousand dollars. In that event the United States were to retain the said sum of three hundred thousand dollars. It is certainly clear that not a dollar of the three hundred thousand dollars was to be paid in exchange for an acre of this land. The latter part of the article is wholly repugnant to the idea that there was an absolute cession of this land, as stated in the first clause in the article, in consideration of the sum of three hundred thousand dollars. When in a statute there are several clauses which present, as compared with each other, an in-

cilable conflict, the one last in order of date or local
on must, in accordance with this rule, prevail, and the
s be deemed abrogated to the extent of such repug-
r, whether the conflicting clauses be sections of the
act or merely portions of the same section (Endlich
terpretation of Statutes, § 183; see also § 185).

cannot avoid the conclusion that there is nothing in
article of the treaty which shows that this land was
for three hundred thousand dollars. *On the contrary,*
amination of the entire article itself shows that there was
sion for three hundred thousand dollars, as stated in the
lause of the article, or for any other sum whatever.

then, the money was not paid for the land, what then
he consideration; what the inducement which moved
Choctaws and Chickasaws to cede the land? Most un-
ionably it was their belief that the land was to be used
e purposes for which they had been told at Fort Smith
the Government desired it—*the location of Indian tribes*
n. The main inducement to remove west had been
val to a country where they would be free from the
nce of the white man. They *saw in the erection of an*
n colony on their border a protection against the intrusion
white man.

hen the fifth stipulation was submitted to them at Fort
they understood that a portion of their land was to
apart for the colonization of friendly tribes thereon.
the unsigned treaty drafted by the commissioners
gain submitted to them, at the close of the proceedings
Fort Smith conference, they understood that the treaty
55 was to be so modified that the Government might
, as it might desire, any tribes, without exception or
ction as to the character of the tribe, on the so-called
l district. When they saw incorporated in the treaty
66 provisions for the establishment of an Indian gov-
within the Indian Territory, with delegates from all
ibes in the Territory, and from which Territory white
s

men would be excluded, how could they understand of
wise than that an Indian colony was to be erected in
leased district, and what could have been a greater ind
ment to them to cede the leased district than the estab
ment of an Indian colony thereon, protecting them aga
the intrusion of the white man and guarding them aga
a white man's government?

And, if possible, this was made still more manifest n
by the insertion of articles 10 and 45 of this tre
These articles reaffirmed all the obligations of the G
ernment to them under former treaties and acts of legi
tion prior to the rebellion and restored them to all th
rights and privileges under the same. The most preci
of all these rights, the most highly prized of all these obli
tions, was the solemn covenant of the Government that
Territory or State should ever pass laws for the governme
of the Choctaw Nation of red people, and that no part
the land granted them should ever be embraced in a
Territory or State. Articles 10 and 45 are perfectly co
sistent with a cession of this land for Indian purpos
If it was an absolute cession they have no place in th
treaty whatever, and any other construction means confi
cation.

Again, article 30 of said treaty provides for the admi
sion of civilized Indians, generally known as Kans
Indians, east of 98 degrees, and for their incorporation amon
the Choctaws and Chickasaws. Article 37 provides fo
the compensation to Choctaws and Chickasaws for th
lands which might be occupied by the Indians so introduce
and incorporated among them. In the draft of a propos
treaty submitted on the last day of the conference at Fo
Smith in September, 1865, for the consideration of the Choct
and Chickasaw legislatures, but which appears never to ha
been considered, there were two cessions contemplated. O
related to the country east of 98 degrees. It was not to e
ceed one-third in area of the Choctaw and Chickasaw cou

try. The other was the cession of the leased district west of 98 degrees. The first cession was in express terms for "the settlement of friendly Indians from Kansas and elsewhere." The Commissioner, in his report for 1865, p. 36, says that the leased lands and this one-third area east of 98 degrees were for the same purpose. Now, when the treaty of 1866 was framed in lieu of a cession of land east of 98 degrees, there was substituted article 30, which provided for the admission of Kansas Indians east of 98 degrees, and their incorporation among the Choctaws and Chickasaws as their fellow-citizens; and this article 30, as well as 31 and 37, were all dependent upon the Choctaws and Chickasaws agreeing to a survey, as provided for in the eleventh article. They were a part of the scheme of survey and division of the lands in severalty, and the scheme having failed, articles 30, 31, and 37 became wholly inoperative and void, the United States lost the privilege of locating the Kansas Indians east of the 98th degree of west longitude, and by the contention of counsel for the United States the fifth proposition was brought to nought. The other cession of the leased district remained, but the purpose for which it was ceded was in no wise changed. There is no reference to any change of purpose for the acquisition of the leased district. It does not anywhere appear that the United States expressed any desire to change the purpose for which the land was ceded under the treaty of 1866, from what was declared to be the purpose under the fifth stipulation at Fort Smith and under the unsigned treaty of 1865. The Indians were obliged to conclude that they ceded the leased district in 1866 for the same purposes which were mentioned in the draft of the unsigned treaty of 1865. The main purpose of preserving the entire Indian Territory for the settlement of Indians, or in some cases Indian freedmen, and the exclusion of whites, is everywhere preserved throughout the negotiations and in all the treaties. Again, in 1866, after the various treaties with the Cherokees, the Creeks, the Seminoles, and with the

Choctaws and Chickasaws had been executed, Commi
Cooley, of the Indian Office, who had been president
United States Commission at Fort Smith, and who ha
Commissioners Sells and Parker, negotiated these
treaties of 1866, made a report concerning them. On

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8, 9, and 10 of the Report of the Commissioner for
Affairs for 1866, Mr. Cooley says:

We now come to the series of treaties made with the
or nations resident in the Indian country south of K
In the annual report of this office for 1865, a very ful
ment and report was made of the conference at Fort
Arkansas, resulting in a primary treaty with those
[by which general terms of peace were establishe
having to a greater or less extent engaged in the reb
against the Government and it was agreed that del
should be sent to Washington for the purpose of conc
formal treaties with each tribe or nation for the settl
of all questions of difference arising from the war, a
re establishing the Indians upon their lands, under c
defined provisions, applying to all classes of their p
tion.] With this purpose in view, the Cherokees,
Seminoles and Choctaws and Chickasaws, appeared in
ary, 1866, by their representative delegates duly c
there being double delegations in some cases, respec
representing two parties in each nation—those wh
remained loyal to the Government and true to their
stipulations, and those who had taken part in the rebe
These negotiations were carried on, on the part of the
ernment, by the Commissioner of Indian Affairs in co
tion with Colonel E. S. Parker, and Superintendent
Four principal points came up for settlement, to wit:

[The proper and just method of adjusting affairs be
the loyal and disloyal, this point applying especially
Cherokees where confiscation laws, passed by the na
council, had taken effect upon the property of those
were disloyal.

The proper relations which the freedmen should hen
hold towards the remainder of the people.

A fair compensation for losses of property occasion
those who remained loyal by the disloyal party.]

Cession of lands by the several tribes to be used for the

ment thereon of *Indians whom it is in contemplation to remove from Kansas.* [*The first tribe with which arrangements were consummated was the Seminoles:* Concluded March 21, 1866; ratification advised July 19, 1866; proclaimed August 16, 1866. By this treaty renewed pledges of peace and friendship are made and a complete amnesty for all offenses arising from the rebellion. Slavery is entirely abolished, and the freedmen placed upon an equal footing with the remainder of the people. This equality was the more easily accomplished in the case of the Seminoles, since there had already been a considerable intermingling of the races before the tribe removed from Florida, and several of the interpreters accompanying the delegation representing the tribe appeared to be of purely African blood. *The Indians cede to the Government the entire domain secured to them by the treaty of* 1856, amounting to (estimated) 2,169,080 acres, for which they receive the sum of $325,362. They receive a new reservation of 200,000 acres at the junction of the Canadian river with its North fork, for which they pay $100,000, and the balance (of $225,362) is to be paid as follows: $30,000 to establish them on their new reservation; $20,000 to purchase stock, seeds and tools; $15,000 for a mill; $50,000 to be invested as a school fund; $20,000 as a national fund; $40,362 for subsistence, and $50,000 for losses of loyal Seminoles, to be ascertained by a board of commissioners. A right of way for railroads is granted through the new reservation, and $10,000, or so much as is necessary, is to be expended for agency buildings. The Indians agree to the establishment, if Congress shall so provide, of a general council in the "Indian country," to be annually convened, consisting of delegates from all the tribes in the proportion of their numbers, respectively, and to have power to legislate upon matters relating to the intercourse and relations of the several tribes resident in that country, the laws passed to be consistent with treaty stipulations and the Constitution of the United States. This council is to be presided over by the superintendent of Indian affairs. (It will be seen hereafter that this plan is more fully carried into effect in the treaty with the Choctaws and Chickasaws.) The Seminoles ratify the diversion of annuities made during the war for the support of refugees, but the payments due under their former treaties are to be renewed and continued as heretofore. They grant six hundred and forty acres of

land to each society which will erect mission or school buildings, to revert, however, to the tribe when no longer used for its proper purpose (Report on Indian Affairs, 1866, pp. 8 and 9).]

The next treaty in this series was made with the confederated nations of Choctaws and Chickasaws concluded April 28, 1866; ratification advised, with an amendment, June 28, 1866; amendment accepted July 2, 1866, and proclaimed July 10, 1866.

[This treaty, in its careful attention to all details deemed necessary, is the most complete of the series, and when its various provisions are brought into full operation will establish the confederated tribes upon a basis of enduring prosperity. It contains, of course, the usual provisions for the re-establishment of peace and friendship, of amnesty, and the abolition of slavery in every form. *The Indians cede to the Government the whole of that tract of land known as "Leased lands," which have been long held (rented by the Government) for the use of Indians removed from Texas, and amounting to* 6,800,000 *acres.* For this the Government is to pay $300,000, to be invested at five per cent. interest until laws are passed by the Choctaws and Chickasaws providing full rights, privileges, and immunities, and grants of forty acres of land each for their freedmen, which laws are to be passed within two years. If so passed, that sum, with its accumulated interest, is to be paid, three-quarters to the Choctaws and one-quarter to the Chickasaws. If such laws are not passed, then the $300,000 to be kept and used by the Government for the benefit of the freedmen.]

The point of contention is for what purpose the leased district was ceded. We say for the settlement thereon of friendly tribes of Indians from Kansas and elsewhere, and possibly and contingently Choctaw and Chickasaw Indian freedmen. The defendants say the cession was an absolute and unconditional cession, "unencumbered by any understanding as to occupancy of the ceded district." Defendants say (p. 215 of brief of def't Indians) "that one of the principal points which came up for settlement in all of the treaties was" (quoting from this report) "cession of lands by the several tribes to be used for the

Hin Court of Claims)

settlement thereon of Indians whom it is in contemplation to remove from Kansas;" but they say that object "has nothing to do with the 3d article of the treaty." Why, it was under the third article of the treaty the leased district was ceded; and the Commissioner, after referring to the appearance in this city, in January, 1866, of the Cherokees, Creeks, Seminoles, and Choctaws and Chickasaws, by their representative delegates duly chosen, proceeds to say that negotiations were carried on, on the part of the Government, by the Commissioner of Indian Affairs, in connection with Col. E. L. Parker and Superintendent Sells. He then proceeds to say that four principal points came up for settlement, and after mentioning three points he reaches the fourth, and states it, just as I have quoted it from defendants' brief, as follows:

"Cession of lands by the several tribes to be used for the settlement thereon of Indians whom it is in contemplation to remove from Kansas."

It is to be noted here that this point of settlement came up with all the tribes—the Cherokees, Creeks, Seminoles, and Choctaws and Chickasaws—and though he may not have used in this report the precise language of the fifth stipulation at Fort Smith, yet it cannot be doubted that these cessions were required in conformity with that stipulation.

After stating the four points in connection with the negotiations carried on with all the tribes, the Cherokees, Creeks, Seminoles, and Choctaws and Chickasaws, he next proceeds to give an account of the arrangements made with the Seminoles, and then states what they ceded to the Government. Then he proceeds to say: "The next treaty in the series was made with the confederate nations of Choctaws and Chickasaws," and he then, as in the case of the Seminoles gives an account of the arrangements made with the Choctaws and Chickasaws, and states what was ceded by them in these words:

"The Indians cede to the Government the whole of that tract of land, known as the 'Leased lands,' which have been long held (rented by the Government) for the use of Indians removed from Texas, and amounting to 6,800,000 acres."

Now, throughout the whole text of the report no passage can be found expressive of the purpose for which the lands were ceded, except when the Commissioner states the fourth point, which came up in the negotiations for settlement "in all of the treaties."

What was this fourth point?—"cession of lands by the several tribes to be used for the settlement thereon of Indians, whom it is in contemplation to remove from Kansas." Manifestly this was the only purpose, as stated by the Commissioner in his report for the cession of the leased district, just as it was the only purpose in the case of the Seminoles, for which they ceded their entire domain secured to them by the treaty of 1856. (See page 214 of defendant Indians' brief.) No other purpose is named by the Commissioner for either cessions.

Nowhere in this report of the final negotiations which resulted in the treaty of 1866 is there to be found the slightest evidence of any change of purpose on the part of the Government from the purpose set forth in the fifth stipulation at Fort Smith in September, 1865, when the negotiations began, nor from the fifth article of the unsigned treaty submitted for their consideration at that time. Neither does the record anywhere disclose that any information on the subject of the uses which were to be made of the leased district was imparted to the Choctaws and Chickasaws, save as set forth in the fifth article of the unsigned treaty, and we cannot but conclude that the Commissioner, when he says that one of the points which came up for settlement was cession of lands for the settlement thereon of Indians, and he afterwards gives an account of the cession of the leased district, means to be understood as saying that said cession was made

nformity with said fifth stipulation and said fifth article
id unsigned treaty.

it we are not yet quite through with what we desire to
oncerning what the defendants urge, in addition, to
that the cession of lands by the several tribes to be
for the settlement thereon of Indians whom it is in
emplation to remove from Kansas has nothing to do
the third article of the treaty of 1866. Notwithstand-
the third article of the treaty of 1866 has only reference
he leased district, and notwithstanding the Commis-
er mentions no other cession than the cession of the
d district, and mentions this after stating, as the fourth
t to be considered, which came up for settlement in all
treaties, "*the cession of lands by the several tribes to be
for the settlement thereon of Indians, whom it is in con-
plation to remove from Kansas*," defendants say that this
nothing to do with the third article, and that the settle-
t of Indians from Kansas is fully provided for in the
tieth article of the treaty. Now, this thirtieth article
es to the incorporation of a certain number of Kansas
ians with the Choctaw and Chickasaw tribes, east of 98
rees, of whom they were to become fellow-citizens, and
whom they were to acquire homes. Now, if this was
cession referred to by the Commissioner for the settle-
t of the Kansas Indians, why did he not say so?
Why does he confine himself in this connection to a men-
of the leased district as the lands ceded to the Govern-
t? It was because there was no other cession by the
ctaws and Chickasaws under the treaty of 1866, except
he third article thereof, of the leased district.
The truth is there was *no cession under the thirtieth* article
he treaty. There was a provision in the thirtieth article
he treaty for the admission of a limited number of Kan-
Indians east of 98 degrees. When so admitted they were
be privileged to acquire homes among them; they were
be made fellow-citizens of these tribes, and they were to

become Choctaws and Chickasaws, but there was no cession of land. The thirtieth, thirty-first, and thirty-seventh articles are wholly inoperative and void. They have no connection with the fifth stipulation submitted at Fort Smith. They are altogether dependent on the assent of the Choctaws to a survey provided for in the eleventh article. That assent never having been given, they fail. They were altogether conditional. *The fifth stipulation was absolute in its terms, whether quoted as stated by Commissioner of Indian Affairs in his report to the Secretary of the Interior, or substantially as it appears in his report as president of the commission at Fort Smith or in the journal of proceedings, and the only cession which is in compliance with the fifth stipulation is the cession of the leased district for the purposes set forth in the said fifth stipulation and in the report of the Commissioner for* 1866.

In the draft of the unsigned treaty, in the fourth article thereof, we find that it was then contemplated by the Government that it should acquire one-third of the territory east of 98 degrees for the settlement thereon of Indians from Kansas (Choctaw Laws, p. 411). But this proposition never was assented to by the Choctaw and Chickasaw Nations. There was no cession of lands in the treaty of 1866 for the settlement of Indians from Kansas, save the cession of the leased district. It is the only cession mentioned by the Commissioner in his report, as quoted by the defendants, and the only purpose of any cession whatever is the purpose set forth in the fourth point for settlement in the negotiations with the several tribes, to wit, cessions of lands by the several tribes to be used for the settlement thereon of Indians whom it is in contemplation to move from Kansas. If it had been an absolute and unqualified cession, why did not the Commissioner so report? If there had been he would have so reported in terms which would have admitted of no mistake. The reason he did not so report was because there was no such cession.

We take the liberty here of incorporating as a part of our

ment some remarks of Senator Dawes, of Massachu-
in the debate on this question in Congress, and in
nse to the charge that the subject was not understood
ngress. Senator Dawes said:

nceive for a moment that the chairman of that com-
ion had succeeded not only in getting the land for In-
s, which he said was so indispensable that it ought to
btained, if necessary, by force; that he not only got
a grant as that, but he got a grant for white people
when he came to report to the Government his success;
ld he have forgotten to communicate to the Government
chiefest of all his successes, if it had been one? No,
President, if Mr. Cooley, who thought it was so import-
to keep this Indian Territory for Indians alone, that in
troubled state of things there he thought it might be
cult, if not impossible, to bring the Indians to even that
ession, that it might be necessary to use force to bring
n there, had succeeded in not only bringing them there,
had got a grant that he felt at liberty to tell this Gov-
ment was a grant open to white men, he would have
it.
he idea of putting white men into the Indian Territory
hat time was as wide from the plans and desires and
poses of the Government as it was of the Indians them-
es. The Government not only had no desire, but the
ernment was opposed at that time to putting white men
that territory (Cong. Record, vol. 23, part 5, 52d Cong.,
session, p. 4086).

We submit that there was no difference in the purposes
which the land was ceded under the Seminole treaty and
purposes for which the land was ceded under the Choc-
and Chickasaw treaty, and if equity and good con-
ence required the United States to purchase the absolute
e of the Seminoles and Creeks in 1889 to the lands ceded
them in 1866 for Indian purposes before opening the
ne to white settlement, equally does equity and good con-
ence demand that the Government should pay now for
absolute title to the lands in controversy a fair equiv-

alent for the same which the Government likewise acquire
for Indian purposes in 1866.

This brings us to the final execution of the treaties wi
the five tribes in 1866. Now, it must be recollected that
the cession by the Choctaws and Chickasaws they merel
opened to the settlement of additional tribes, and possib
to Choctaw and Chickasaw freedmen, land already held
the Government for Indian purposes under the lease
1855. These lands, it will be recollected, had been alread
leased to the United States for the settlement of certain trib
specially excluding some and specially including others, p
vided, however, that the lands should remain open to set
ment by Choctaws and Chickasaws as heretofore prior to 18
Now, while we find in the history of the negotiations at Fo
Smith reference to opening these lands for the settlement
Indians generally, it does not anywhere appear that a sug
word was ever spoken or written either during the ne
tiations at Fort Smith nor in any subsequent negotiatio
in Washington or elsewhere calculated to awaken
slightest suspicion in the Indian mind that the lands to
ceded were to be opened to white settlement, or to be u
for any other purpose than the colonization thereon of I
dian tribes, or possibly for making some suitable provis
for the Choctaw and Chickasaw freedmen should these
tions refuse to adopt them. When it is borne in mind t
they had exchanged their original homes east of the M
sissippi for their present homes in the Indian Territory
order that they might be remote from the presence and
fluence of the white man, *the slightest suggestion that the la
to be ceded were to be absolutely ceded would not merely h
aroused the deepest suspicion, but have awakened the most
found resentment.* If the Government had any such int
tion or purpose, or intended to secure the right to use th
lands for any such purpose hereafter, it was bound to
close it in these negotiations. Under every rule wh
governs a contract between a guardian and a ward, betw

a superior and an inferior, as we shall hereafter see when we examine the rules governing the interpretation of Indian treaties, it was bound to have disclosed that such was the purpose of the cession, and having failed so to disclose it, it cannot now use the lands for any such purpose.

In the face of the fifth stipulation at Fort Smith, of the fifth article of the unsigned treaty, of article 8 of the treaty of 1866, establishing an Indian government for the Indian Territory, and of the sixth stipulation at Fort Smith, and of article 43 of this treaty, and of the absence of any other injunction concerning the purposes of the Government, it was utterly impossible for the Choctaws and Chickasaws to have imagined that they were making a cession under which the Government would be permitted to open the leased district to white settlement. We think the evidence already adduced clearly establishes that the cession of the leased district, under the treaty of 1866, was made to the United States *in trust* for the colonization thereon of friendly tribes of Indians from Kansas and elsewhere, and was never to be divided in severalty, nor opened to white settlement, unless thereafter agreed upon.

There is much additional extrinsic testimony remaining yet to be considered confirmatory of this position, but before we proceed to refer to it we desire to call attention to the action of the Choctaw and Chickasaw Nations in their legislative assemblies relative to the treaty of 1866, adopted at an early date subsequent to its execution.

LEGISLATIVE ACTS OF THE CHOCTAWS AND CHICKASAWS RELATIVE TO THE TREATY OF 1866.

a R. 42

The act of the Choctaw council, approved December 21, 1866, is found in Laws of Choctaw Nation, edition 1869, pages 450 and 451.

It is as follows:

Whereas, the Senate of the United States did, on the 28th day of June, A. D. 1866, advise and consent to the

ratification of the articles of agreement and conventio
tween the United States and the Choctaw and Chick
commissioners, and the same having been confirmed b
President of the United States on the 10th day of Jun
lowing; and

Whereas, the same having been submitted to the ge
council of the Choctaw Nation, and having been interp
and fully explained; therefore,

SECTION 1. *Be it enacted by the general council of the
taw Nation assembled*, That the report of the Choctaw
missioners and all their acts respecting the negotiatio
the late treaty made and concluded at Washington
between the United States and the Choctaw and Chick
Nations of Indians be, and the same is hereby, receive
approved.

SEC. 2. *Be it further enacted, That the propositions con
in the 3d and 8th articles of said treaty are hereby deferred
the next regular session of the general council*, and the
and 47th articles are hereby referred to the people at
to be declared through their legal representatives in co
at the October session, A. D. 1867, and the principal
is hereby required to issue his proclamation, when he
think expedient, calling the votes of the people, the spe
article above.

SEC. 3. *Be it further enacted*, That this act take effec
be in force from and after its passage.

A.R. 43

The act of the Chickasaw legislature approved Nove
9, 1866, is as follows (constitution, laws, and treaties
Chickasaws, Fort Smith, Arkansas, 1876):

AN ACT CONFIRMING THE TREATY OF 1866.

SECTION 1. *Be it enacted by the legislature of the Chic
Nation*, That whereas, a treaty was concluded at Washi
city on the 28th of April, 1866, by commissioners du
pointed on the part of the Chickasaws, Choctaws, an
United States Government, which treaty was ratified
amendments by the United States Senate and confirm
the President, the Chickasaw legislature does hereby
its assent, and confirm the said treaty and amendments
by the Senate of the United States.

SEC. 2. *Be it further enacted*, That the Chickasaw legislature does hereby give its assent to the sectionizing and allotment of the lands in severalty, under the system of the United States, as is provided for in the treaty of April, 1866, and the President of the United States is hereby requested to cause the same to be done as soon as may be practicable.

SEC. 3. *Be it further enacted*, That the provisions contained in article 3d of the said treaty, giving the Chickasaw legislature the choice of receiving and appropriating the three hundred thousand dollars therein named for the use and benefit of the Chickasaws, or passing such laws, rules and regulations, as will give all persons of African descent, certain rights and privileges, be, and it is hereby, declared to be the unanimous consent of the Chickasaw legislature, that the United States shall keep and hold said sum of three hundred thousand dollars for the benefit of the said negroes. And the governor of the Chickasaw nation is hereby requested to notify the Government of the United States, that it is the wish of the legislature of the Chickasaw nation, that the Government of the United States remove the said negroes beyond the limits of the Chickasaw nation, according to the requirements of the 3d article of the treaty of April 28, 1866.

Approved November 9, 1866.

Now, it is to be observed in reference to both of these acts that neither of them absolutely and unqualifiedly ratify the treaty of 1866. Both nations clearly understood that the three hundred thousand dollars provided to be paid under the third article of the treaty of 1866 was not to be paid for the leased district. Both clearly understood that they had the choice of receiving this three hundred thousand dollars in consideration of conferring on persons of African descent resident among them, their former slaves and their descendants, the rights and privileges named in said articles, including the right of suffrage, together with giving to such persons and their descendants forty acres each of the lands of said nations, within two years from the ratification of the treaty or of refusing the same, and in the event of such refusal that they were not to receive a dollar of said sum of

three hundred thousand dollars, but that the same should then be used for the benefit of such persons of African descent as within ninety days after the expiration of the two years would remove from the said Choctaw and Chickasaw Nations, and in the further event, if they did not remove, that the United States would retain the said sum of three hundred thousand dollars. This was the proposition. This was the election they were to make. Now, it will be recollected that the Choctaws numbered in the neighborhood of between 14,000 and 15,000 people, of whom 10,000 were Indians, and about 4,500 were persons of African descent, while the Chickasaws numbered about 7,000, of whom about 3,400 were Indians and 3,700 were persons of African descent. Among the Choctaws the Indians were about double the number of the negroes, while among the Chickasaws the negroes considerably outnumbered the Indians.

The Indians in both tribes were very hostile to conferring these privileges, especially the right of suffrage, on the negroes. But it will be seen by the proportions which existed between the two classes of population in the two nations that the Choctaws incurred much less risk in conferring these rights and privileges than did the Chickasaws. Hence, the Choctaws did not refuse absolutely to confer these rights, but merely postponed action on the subject. But the Chickasaws at once and promptly exercised the choice given them, refused to confer the rights and promptly rejected the bid of three hundred thousand dollars. It is to be noticed further that in the event of conferring these privileges the Choctaws were to receive $225,000 for conferring these privileges on less than half of their population, while the Chickasaws were to receive but $75,000 for conferring the same privileges on a majority of their population. Neither nation conferred these rights within the two years allowed by the treaty. The Chickasaws have never yet conferred them, and the freedmen among them have never been removed. Finally, under legislation passed by Congress in 1882, the

Choctaws adopted their freedmen, and, so far as the Choctaws are concerned, this vexed question has been settled. It has been charged that these nations were paid $200,000 on account of these lands. It is not so. They received $200,000 agreeably to article 46 of the treaty of 1866, of which the Choctaws received $150,000 and the Chickasaws $50,000. But, as we have heretofore seen, it was simply a loan, amply secured under the terms of said article 46, for the Government was to reimburse itself out of the three hundred thousand dollars, in the event these nations earned this amount by the adoption of their freedmen, in accordance with the provisions of the third article of the treaty of 1866, and if not out of this money, then out of such money as they might become entitled to for the admission of Kansas Indians east of 98 degrees, and if not out of that fund, then out of other moneys belonging to said nation which were in the hands of the United States. This advance was, in effect, only a loan, and a loan most amply secured.

When the Choctaws adopted their freedmen under the legislation of 1882, then, so far as they were concerned, it ceased to be a loan—the amount became a payment to them, and the balance of their share was entered as a credit to the Choctaws on the books of the United States Treasury (article 46, treaty of 1866; Report of Commissioner of Indian Affairs, 1887, p. lxii; letter of R. V. Belt, acting Commissioner of Indian Affairs, to the Secretary of the Interior, September 13, 1890, to be found in House Report No. 3147, 51st Cong., 1st session, pp. 14 and 15 of said report). The amount advanced the Chickasaws still remains a charge against them. Could anything establish it more conclusively that the $300,000 was not to be paid for the land, but for the adoption of the freedmen in accordance with the provisions of said third article of the treaty of 1866?

We thus see it was long before the Choctaws could be induced to adopt their freedmen, and we see that the Chickasaws still refuse to do so. Both nations were apprehensive

of negro domination. This feeling prevailed everyw
throughout the South, and it was, of course, strongo
those States where the negroes outnumbered the w
We all know that great uncertainty prevailed in the
state of political excitement as to what would be
There was a great struggle going on between what wa
derstood to be the policy of President Johnson and
was the congressional policy. The same feeling must
existed to a greater extent among the former slave-ho
Indian tribes. They all knew that the seven propos
which were presented at Fort Smith constituted the ba
the treaties of 1866, and one of these was that—

The institution of slavery, which had existed amon
eral of the tribes, must be forthwith abolished, and
ures taken for the unconditional emancipation of all p
held in bondage, and for their incorporation into the
on an equal footing with the original members, or su
provided for.

It was clearly seen by the Indians at Fort Smit
while there was no intention to provide homes for
men in the new lands to be acquired by the Gover
the new policy of the Government contemplated pro
in these new lands for homes for the Indians from I
and elsewhere, *and also, if necessary, for the Indian fr*
of African descent. This is most strikingly states
speech made by *one of the head men of the Osages,* in
to the *speech of President Cooley, of the commission,* w
he says:

"*You told them also that no white men except officers*
be allowed in the Indian country. Now, you have prohib
white man, and why do you say the negro may come i

So, also, Judge Parker afterwards, in his review o
treaties of 1866, 2 McCrary, 290, says:

"The Government was desirous of protecting thes
men, and of securing them homes. *It was not kno*

well the several Indian tribes who had held them in slavery would observe their pledges to secure them the same rights they had enjoyed. It was feared that the prejudice growing out of their former condition as slaves and of race would be so strong against them that they would not be protected by the Indians. The Government was in duty bound to secure them their freedom. The Government feared that to do this it might become necessary to settle them in a colony by themselves. The purpose of the Government, *should it become necessary*, was manifested by the terms of the Choctaw treaty of April 15, 1866."

That purpose was contingently, under certain circumstances, the establishment of a negro colony, and where else were the Choctaw and Chickasaw freedmen to be located except in the leased district? The apprehension of the Choctaws and Chickasaws was the establishment of a negro colony on their border. The Government feared that the creation of this negro colony might become necessary. The leased district was unoccupied, at least to a very great extent. The treaty locating the Kiowas and Comanches in the leased district was not proclaimed until August 10, 1868. The Cheyennes and Arapahoes were not located in the leased district until by executive order of August 10, 1869. Under these circumstances, and while in this state of uncertainty and apprehension, the Choctaw council passed the act of November 20, 1867. This was "An act entitled an act to authorize the national attorney to attend to the claims set up against the nation under the 49th and 50th articles of the treaty of April 28, 1866, and for other purposes." The act is nothing more or less *than the instructions of the Choctaw council, put in the form of a legislative enactment and directed to their national attorney, as to the course he is to pursue in Washington city.* There is but one section of the act which it is material to this question to quote, and that is section 3, which is in these words:

SEC. 3. *Be it further enacted*, That the national attorney be and he is hereby instructed to respectfully bring to the notice

of the Commissioner of Indian Affairs, that this nation will not consent to give the freedmen residing among them the forty-acre lots of land, including the right of suffrage, mentioned in the third article of the treaty of April 28th, 1866, where they have humbly to submit to the forced sale of the leased district, lying west of 98th degree west longitude, for about 2½ cents per acre for objects of negro colonization upon their borders, and he shall also request the said Commissioner of Indian Affairs to provide in due time for said freedmen, for their removal to some country, and remove Kansas Indians here in their stead, if they are willing to be removed.

Great importance is placed on this act by the counsel for defendants in their brief. They claim that it is an admission by the Choctaws that there had been a sale, under which the Government acquired the right to use the leased district for purposes of colonization of negroes thereon, and the argument is that if they had a right to use this district for that purpose, they have the right now to open the lands to white settlement. We have already seen the circumstances under which this act was passed, the uncertainty then existing, and the apprehension of the Choctaws—their fear of negro domination and their apprehension of a negro colony on their border—and we have seen that in fact while the white man was expressly excluded from the territory, there were special provisions for the Indian freedmen looking to providing homes for them, in case of necessity, in lands which had been ceded for Indian purposes, and the statement of the Choctaw council that it was a "*forced sale*" grew out of the *demand* brought to Fort Smith in 1865 by the United States commissioners for such a cession.

While under the fifth stipulation the land set apart was for the location of friendly tribes now in Kansas and elsewhere, yet they knew that under the third stipulation the negroes formerly held in slavery were to be suitably provided for. It was natural, therefore, considering the power of the Government, and in view of the uncertainty as to

at would be done concerning the negro, and when no dian tribes had been removed to and located in the leased strict, that they should have been apprehensive of the es-blishment of a negro colony on their border. But they not even then refer to the sale as an absolute sale, but a le in trust, which would include in the purposes of the ust the colonization of negroes in the leased district; and en then they express their desire for the location of negroes ewhere, and the removal to this leased district of Kansas dians, showing clearly that even at such a time and der such pressure they regarded the establishment friendly tribes on their border as the special purpose of e trust for which the lands were ceded. In the uncertain ndition of the country at that time, with the power of the nited States Government, with the requirement in the ird stipulation that suitable provision should be made r persons heretofore held in bondage, and with the three ndred thousand dollars provided for in the third article the treaty in the hands of the United States with which remove them, they had good reason to apprehend that eir former slaves might be colonized west of ninety-eight grees. The Court of Claims (p. 77; Transcript of Record, 427), of the decision say:

"The inconsistency of this act with any other understand-g is diminished by the time of its passage, and the pre-ous and subsequent conduct of the Choctaws. It is com-etely contradicted by the conduct of their immediate ighbors and coadjutors, the Chickasaws, and being acted with reference to exigencies and the probable re-oval of freedmen to the land, either threatened or sup-sed to be, we attach no unnecessary importance to it. nd being in the face of what we believe was the under-nding as to the uses to which the lands were to be put, en they were called on to make the cession the depart-ental construction must be held to be what the Govern-nt intended, and with that kind of understanding by e and conscientious officials of the Government, the dians likewise must have understood this act as they ege."

We protest that under such circumstances no such c
struction can be drawn from the passage of this act
opposing counsel seek to maintain; on the contrary, t
act was consistent with the purposes of the cession, as
forth in the report of the committee of the Senate of
United States, No. 552, 52d Cong., 1st session, p. 11, a
which maintained that these lands were ceded in trust—

(1.) To locate upon these lands Indians like these Ch
ennes and Arapahoes, whose ranges were not within t
limits designated by the treaty of 1855, and whom prior
the treaty of 1866 the United States had no right to loca
upon the lands.

(2.) To locate thereon Choctaw and Chickasaw freedme

(3.) To deprive the Choctaws and Chickasaws themselv
of the right to settle thereon.

While not concurring in full with these views, yet the
are sufficient to show that in the early days after the w
they might have been actuated by well-grounded fears an
apprehensions in the passage of the act, and this must de
prive the act of the importance to which counsel on th
other side attach to it.

Having considered the only acts of the Choctaw and
Chickasaw legislation which affect this investigation, to
gether with the testimony antedating the treaty of 186
and the facts and circumstances which surrounded it at the
time of its execution, we propose now to consider such

ADDITIONAL CONTEMPORANEOUS TESTIMONY

as sheds light on the purposes for which the treaty wa
made. We first call attention to the admissions of the Gov
ernment in a treaty made with the Delawares 4th of July
1866 (Revision of Indian Treaties, 362, 14 Stat., 109). Thi

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treaty was concluded immediately after the execution of the treaty with the Creeks, June 14, 1866; with the Seminoles, March 21, 1866, and with the Choctaws and Chickasaws, April 28, 1866. The treaty with the Cherokees was concluded July 19, 1866.

This treaty with the Delawares may be said to have been contemporaneously executed with the treaties of 1866 with the Creeks, Seminoles, Choctaws, and Chickasaws, and with the Cherokees. It has direct reference to those treaties, and makes mention of the three treaties with the Creeks, Seminoles, Choctaws, and Chickasaws. The preamble recites:

Whereas, Congress has by law made it the duty of the President of the United States to provide by treaty for the removal of the Indian tribes from the State of Kansas, and whereas the Delaware Indians have expressed a wish to remove from their present reservation in said State to the Indian country, located between the States of Kansas and Texas, and whereas the United States have by treaties negotiated with the *Choctaws and Chickasaws*, with the Creeks and with the Seminoles, Indian tribes residing in said country, *acquired the right to locate other Indians within the limits of the same, then*

Art. 4. The United States agree to sell to the said Delaware Indians a *tract of land ceded to the* Government by the Choctaws and Chickasaws, the Creeks or the Seminoles, or which *may be ceded* by the Cherokees in the Indian country to be selected by the Delawares, etc.

The natural conclusion from this reading is that the United States had lately acquired from the Creeks, Seminoles, and Choctaws and Chickasaws distinct tracts of land; that by the cession of these tracts the Government had acquired the right to locate other Indians on them, and that in pursuance of this right the United States proposed to sell a tract to the Delawares on any one of the tracts acquired from those several tribes. Now, here is a contemporaneous declaration by the Government that the same right was acquired under the Choctaw and Chickasaw treaty which was

acquired under the Creek and Seminole treaties, and this was a right to locate other Indians within the limits of the tract ceded to the Government by these tribes.

ACTION OF THE GOVERNMENT UNDER THESE TREATIES.

If we can ascertain what the Government did, we can arrive at a just conclusion as to what were the rights which the Government acquired under these treaties, and for what purpose they were executed.

The necessity of providing for other Indian tribes had been presented to the attention of the Government long before the conference at Fort Smith in 1865. The report of the Commissioner of Indian Affairs, in his annual report for 1864, before the close of the war, declares this policy. (See Report for 1864, pp. 33, 34.) He says:

The Cherokees, Creeks, Choctaws and Chickasaws should be required to receive within the limits of their country, west, other tribes with whom they are on friendly relations.

What was actually done is succinctly stated in the case of The U. S. *vs.* Payne, 2d McCrary, 290.

The court, in deciding this case in 1881, say:

We find that in the year 1866 the Government entered upon the policy of settling tribes of Indians other than the five civilized tribes in the Indian country. Since that time, by treaties, laws, and executive orders of the President, it has settled upon reservations in the Indian country, the Cheyennes and Arapahoes, the Kiowas, the Comanches, the Wichitas, the Pawnees, the Sacs and Foxes, the Nes Perces, the Poncas, the Modocs, the Kansas, the Osages, the Pottawatomies, Absentee Shawnees, as well as some smaller tribes. This shows," says the court, "that the Government not only had a desire to locate other Indians in the Indian Territory, but to a great extent it has consummated that desire.

Further on in same decision the court say:

In construing the treaty—one of the treaties of 1866—have a right to take into consideration the situation of parties to it, at the time it was made, the property which the subject-matter of the treaty, and the intention and purpose of the parties in making the treaty. To get at this intention we have a right to consider the construction, the parties to the treaty, and who were to be affected by it, have been it, and what has been their action under it. The action of the United States which I have cited is sufficient to show its construction of the treaty. It is a matter of public notoriety that the other party to the treaty has agreed with the United States in its construction. Then we have both parties agreeing upon the same construction.

In the country acquired from the Choctaws and Chickasaws by lease in 1855, and by cession in 1866, the Government located the Cheyenne and Arapahoes, the Wichitas and affiliated bands, and the Kiowas, Comanches, and Apaches. (See report of John H. Oberly, Commissioner of Indian Affairs, Senate Ex. Doc. No. 78, 51st Congress, 1st session, in my book of Docs. A.)

We thus see that under the treaties of 1866, after their execution, the Government located on the lands which it acquired from the Cherokees, the Creeks, Seminoles, Choctaws and Chickasaws, *Indian tribes* from Kansas and elsewhere. *It did not open them to white settlement.* It settled on these lands Indian tribes, just as it had declared through the commissioners at Fort Smith it would do; and it pursued the same policy in the execution of the treaty of 1866 with the Choctaws and Chickasaws which it pursued in the execution of the treaties of 1866 with the Cherokees, the Creeks, and Seminoles. These treaties were all alike in the causes out of which they originated, alike in the history of the negotiations which preceded their execution, alike in the objects for which they were framed, and alike in the way in which the Government carried them into practical operation. Four years after their execution, in 1870, Mr.

Cox, Secretary of the Interior under General Grant (Indian Office Reports 1871), said in his report:

The policy of preserving the Indian Territory, as far as possible from intrusion by white settlers in any form, has been hitherto regarded as firmly established in this country. Negotiations for the removal of Indians from the small reservations in Kansas and Nebraska to the Indian Territory have been based upon this policy, and in order to carry it out with any degree of success, it is necessary to adhere to it as firmly as possible.

The history of the action of the Government in carrying out the provisions of these treaties is in perfect conformity with the construction which we have placed on them. What was done specially under article 3 of the treaty of 1866, concerning the consideration of $300,000 therein mentioned, is just what we said was intended by the treaty to be done. We said it was clear that not a dollar of this $300,000 was to be paid for the land ceded; not a dollar of it was paid for the land ceded. We said that it was to be paid to the Choctaws and Chickasaws, under the terms of this article, only in payment for rights and privileges conferred on freedmen of African descent. The only money of this $300,000 paid to either of these tribes was paid to the Choctaws years after the land had been transferred, and only in payment to them for conferring certain rights and privileges on these freedmen. If anything was advanced to the Chickasaws, the Government claims that they are now indebted for such advance. (See p. 15, H. of R. Report 3147, 51st Cong., 1st session.)

The Government, though often petitioned to remove the Choctaw and Chickasaw freedmen from among the Choctaw and Chickasaw Indians, never removed them. Petitions to this end came from both the Indians and the freedmen; but the petitions were not heeded by Congress (Report of Commissioner of Indian Affairs 1887, pp. LX and LXI). On the contrary, whether adopted, as they finally were, by the

octaws, or refused adoption, as they were by the Chicka-
s, they continued to reside among the Choctaws and
ickasaws.

The apprehensions entertained by the Government con-
ning the treatment of the freedmen by the Indians, as
ntioned by Judge Parker in 2 McCrary, 290, were les-
ed in time, and the Government no longer felt that it
s necessary to settle the freedmen in a colony by them-
ves. But in the meanwhile the whole of the leased dis-
ct was settled by Indians under the authority and direc-
n of the Government. The Wichitas and affiliated bands
re located therein, pursuant to the treaty of 1855, in the
ar 1859. They removed in 1862 and did not return to
is location until 1868 (Brief of Counsel for Wichitas, in
ourt of Claims, p. 56); and under the treaty of 1866 the
heyennes and Arapahoes, the Kiowas, Comanches, and
paches were located in the residue of the leased district
cept Greer county. The acts of the Government, to adopt
e language of Judge Parker in the same case just cited,
ainly indicated its purpose in agreeing to the 3d article
the treaty of 1866 and for what purpose the lands were
quired:

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"This action of the United States is sufficient to show its
onstruction of the treaty. It is a matter of public notoriety
hat the other party has agreed with the United States in
s construction. Then we have both parties to it agreeing
pon the same construction. That is the construction to
e taken as the true one, unless the parties to it were mu-
ally led into this construction by fraud, accident or mis-
ake."

The Government having placed this construction on the
hird article of the treaty of 1866 by its location of other In-
lians in the leased district, we are led naturally to inquire
what construction has been placed on this article by the
officers of the Government since these Indians were located
herein.

CONSTRUCTION OF THE CHOCTAW AND CHICKASAW TREATY BY GOVERNMENT OFFICIALS.

The construction by Government officials of this treaty, as well as of the other treaties with other members of the five tribes, arose out of the attempts of white men to enter upon these lands and make settlements thereon. President Hayes and President Arthur were both compelled to issue proclamations warning white intruders off of these lands, on the ground that these lands were Indian country and reserved for Indians only. (For these proclamations see Report H. of R. 3147, 51st Cong., 1st session, pp. 19 and 25; see President's Proclamation, March 16, 1896.)

President Hayes' Secretary of the Interior, the Hon. Carl Schurz, in a letter to the Secretary of War, dated May 1, 1879, says:

"The lands ceded by the Choctaws and Chickasaws were by article 9 of the treaty of June 22, 1855, leased to the United States for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate thereon. Immediately after the treaty of 1866 the Government located on the lands in question the Kiowas, Comanches, Apaches, Cheyennes, and Arapahoes, which all seemed to be in furtherance of the declared policy of the Government, prior to and at the time the said treaty of 1866 was made. *The treaty of* 1866 *substituted a direct purchase for the lease, but did not extinguish or alter the trust.*"

We also refer, in support of the same view, to official communications as follows:

Hon. C. W. Holcomb, acting Commissioner General Land Office, April 25, 1881.

Hon. H. M. Teller, Secretary of Interior, February 14, 1884.

Hon. S. J. Kirkwood, Secretary of Interior, February 17, 1882.

Hon. Hiram Price, Commissioner of Indian Affairs, January 31, 1884.

Hon. Hiram Price, Commissioner of Indian Affairs, January 26, 1885.

Hon. H. M. Teller, Secretary of Interior, January 26, 1885.

Commissioner Holcomb quotes from all the treaties with the five tribes, and, after referring to the Choctaw and Chickasaw treaties of 1855 and 1866, he says:

The Choctaw and Chickasaw cession of April 28th, 1866 (14th Stat., 769), was by the 10th section thereof made subject to the conditions of the compact of June 22d, 1855 (11th Stat., 613), by the ninth article of which it was stipulated that the land should be appropriated for the permanent settlement of such tribes or bands of Indians as the United States might desire to locate thereon.

Again he says:

In pursuance of *stipulations of the foregoing compacts, and in the exercise of the trusts assumed by the United States under the several treaties*, and in accordance with specific provision of law, and the lawful order of the President, all the lands in the Indian Territory, to which the United States has title have been permanently appropriated, and definitely reserved for the uses and purposes named.

And still further on he adds:

The title of the United States to the lands in the Indian Territory is as heretofore shown—*subject to specific trusts*, and it is not within the lawful power of either the legislature or executive department of the Government to annihilate such trusts or to avoid the obligation arising thereunder.

To the same effect are the opinions of Commissioner Price referred to, as also the opinions of Secretary Teller, quoting the previous opinions of Secretary Schurz and Com-

missioner Holbcomb, and endorsing the same. Secre
Teller says:

The status of the lands as thus determined has been
hered to by this department, and April 26th, 1879,
ruary 12th, 1880, and July, 1884, proclamations were is
by the President, warning unauthorized persons ag
going upon these lands.

Commissioner Price, of Indian Affairs, in his report d
January 31, 1884, in response to a resolution of the S
shows how the lands acquired under the treaties of
were then occupied by different Indian tribes. Whe
comes to consider the leased district acquired from
Choctaws and Chickasaws, he proceeds to show on
tracts of said districts the different Indian tribes
Wichitas and affiliated bands, the Cheyennes and A
hoes, the Comanches, Kiowas, and Apaches—have
located. He says the whole of the leased district is
occupied, except the then disputed tract known as
county, Texas, but which, under a late decision of th
preme Court of the United States, has been decided
under the jurisdiction of the United States.

He then concludes:

No part of said territory remains free from appropri
either to a *direct trust assumed by treaty*, or by reserva
for tribes thereon under executive order, except tha
tion still claimed by the State of Texas, and lying be
Red river and the North fork of the same.

The Hon. H. M. Teller, Secretary of the Interior,
ary 14, 1884, in a communication to the Senate in re
to the lands in the Indian Territory, other than
claimed and occupied by the five civilized tribes, say
this, of course, includes the lands acquired from the
taws and Chickasaws, generally known as the leas
trict):

These lands were acquired by treaties with the vario
dian nations or tribes in that Territory in 1866, *to be h*

Indian purposes, and to some extent for the settlement of the former slaves of some of said nations, or portions thereof. Such are the purposes for which said lands are now being used or held according to the common understanding of the objects of the treaties by which they were acquired, and from these arise the necessity for, or obligation to keep said lands in their present condition of occupancy or otherwise.

Again, on the 26th of January, 1885, Secretary Teller made another report in reference to the status of lands in the Indian Territory. He says, "the status of these ceded lands was considered by one of my predecessors, Mr. Secretary Schurz."

We have already quoted from Mr. Schurz what he specially said in reference to the lands ceded by the Choctaws and Chickasaws in 1866. Mr. Teller proceeds to state the general conclusion that no part of said Territory remains free from appropriation *either to a direct* trust, *assumed by treaty*, or by reservation for tribes thereon under executive order, except that portion still claimed by the State of Texas, and lying between Red river and the North fork of the same.

(See the various treaties, agreements, and executive orders from 1866 to the present time.)

He then says:

This status of the land, as thus determined, has been adhered to by this department; and on April 26, 1879, February 12, 1880, and in July, 1884, proclamations were issued by the President, warning unauthorized persons against going upon these lands.

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And further on he adds:

Objections will be made to the occupation of any part of the Indian Territory by other than Indians, on the ground that the Government set apart the territory for the exclusive use of the Indians and covenanted that no others should reside therein. It is not denied that treaties so provide. It is, however, within the power of the Government, with the consent of the Indians interested, to change this provision of the treaties so

that these desirable unoccupied lands may be plac
the lawful reach of the settlers.

Commissioner Price, January 26, 1885, also m
port as to the status of lands in the Indian Terri
than those held by the five civilized tribes. He,
from the letter of Secretary Schurz, already r
Quoting from this letter, he says:

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The title acquired by the Government, by the
1866, was secured in pursuance and furtherance o
purpose of Indian settlement, which was the fou
the original scheme. That purpose was the rem
dian tribes from the limits of the political State
torial organizations, and their permanent loca
other lands, sufficient for the needs of each tribe

In conclusion, Commissioner Price says:

The status of the unoccupied lands of the In
tory, of which those mentioned in the resolution f
as viewed by this department is so fully set forth
partment letter above quoted, fortified by judicia
already referred to, that it appears unnecessary t
thing on the subject beyond remarking, that, as
been shown, it has been the established policy of
ment *in performance of the conditions mentioned in*
by which the Government acquired lands, or the
them in the Indian Territory, for Indian purposes
the best interest of the Government and the India
it, to appropriate such unoccupied lands for the
of Indian tribes, when their removal to the India
is not prohibited by existing treaty stipulations

We also refer in this connection to House R
Fifty-first Congress, first session, in a discussion
tion, and where the reports to which we have
very fully quoted. See report of Acting Commi
therein, and the copies of official communicatio
pages 6 to 30; and we further refer to Senate
552, first session, Fifty-first Congress, where the
tion is most fully and ably presented.

Opposing counsel in their briefs attempt to impair the force and effect of these official communications by seeking to show that they do not mean what their plain words import; but it is unnecessary further to submit any argument in reply to this contention by defendants' counsel. We, fortunately, have an answer from one who is thoroughly familiar with the rulings of the department on this question, who filled with great ability the office of Secretary of the Interior, who himself was called while occupying that position to pass judgment on the meaning of this treaty of 1866 and he has told us, in clear and unmistakable language which admits of no possibility of error, that the construction which we have placed on these official communications interpreting the Choctaw and Chickasaw treaty of 1866 is absolutely and unqualifiedly correct. The Senate of the United States had this question under consideration in the months of April and May, 1892, when it was most elaborately discussed. At that time, on the 9th day of May, 1892 (see Congressional Record, vol. 23, part 5, 52 Cong., 1st session, pp. 4091 and 4092) the Hon. Henry M. Teller, then a Senator from Colorado, and formerly Secretary of the Interior, thus expressed himself:

It is true that these remarks were made in debate and are not admissible as evidence of the meaning of the treaty, but they relate to rulings of the department, of which the Senator had been once the head, and it seems to me that they are admissible as showing the true meaning of those rulings here disputed, and they are further admissible to refute the charge which counsel have made that Congress was not acquainted with the subject-matter of discussion. Besides, we introduce them as argument, which we adopt as our own.

Mr. TELLER: I take issue with the Senator from Iowa, when he says these Indians have been paid for this last so-called cession. In 1855, they sold whatever rights they had to another tract of land. They granted leasing privileges

to the United States, reserving to themselves certain rights. In 1866, they entered into a contract with the Government of the United States by which they would do certain things with reference to the freedmen of these two tribes. In consideration of what they were to do for the freedmen, they were to be paid $300,000. Although the draftsmen of the bill did say that it was in consideration of the cession of the land, no man can read the whole context of that treaty and not know that it was not for that purpose, but was for the purpose of compensating them for their treatment of the freedmen, *and the Government dealing with them from that day to this hour has been in line with that suggestion and with that theory.* It has never been contended for one minute until within the last two years, *at least by anybody in the department, that they had been paid a single cent for the land.* We provided that they should make the freedmen citizens of that country. We provided then if they did make them citizens we would give them $300,000, and we said, *ex industria*, if you do not make them citizens, the $300,000 goes to the freedmen. How can it be said that was in consideration of the cession? Let me read this clause, which the Senator from Connecticut evidently overlooked:

"And should the said laws, rules, and regulations not be made by the legislatures of the said nations, respectively within two years from the ratification of this treaty, then the said sum of $300,000 shall cease to be held in trust for the said Choctaw and Chickasaw Nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said Territory in such manner as the United States shall deem proper."

How can it be said that this was a payment in purchase for that land and that the Chickasaws and Choctaws proposed to donate $300,000 to the Government of the United States to remove people, that they were under no legal obligation whatever to maintain within their borders? The Chickasaws received $55,000, and they have negotiated with the Government from time to time and proffered to return that to the United States if the United States would remove these freedmen, showing that it has been the understanding not only of *the Government of the United States but of the Indians themselves that the* $300,000 was not for cession of the land, but for the purpose I have mentioned.

Mr. President, in dealing with these Indians we must deal

with them as the Supreme Court said we should. We must give them the benefit of a construction that seems to be in accordance with what was then the intent. It may be, as the Senator from Connecticut has said, that the Government has the legal title; but the Government *got the legal title for a particular purpose*, and the Government, if it did not become the trustee by the implied trust, held it in such a shape that if the transaction had been between two men instead of between two nations, a court of equity would have decreed and declared what the trust was for and how it should be applied.

I repeat that the department has held, from the time this treaty was made, beginning with the declaration of the Commissioner of Indian Affairs who made the treaty when the council was called, that the purpose of the cession of the land was to put Indians on it and not white men, and when he reported to Congress after the treaty was made he declared that that was the treaty. It was the intention on the part of the Government of the United States that the treaty should so declare, and that was the intention of the Indians who thus treated with the Government of the United States.

It probably is true that we have a technical advantage of these wards of ours, and it is possible, considering that there are eight or nine or ten millions of money at stake, that we may repudiate our plighted faith to these people, and that we may do that which we would not dare to do with a nation of great strength and importance; but does it become this great Government to fall back upon a technicality and say: "By the words of your treaty we are the owners and we decline to recognize any title in you," when everybody understands that the policy of the Government was at that time not only to the Chickasaw and Choctaw Indians, but to all other Indians within the Territory; and that was to acquire their land for a particular purpose, and for no other purpose than that which was declared in all the treaties save this by exact and express words?

We might introduce numerous other quotations from the rulings of the executive officers of the Government, but they will be found more extensively quoted in House Re-

port No. 3147, Fifty-first Cong., first session, and in General Paine's Supreme Court Brief, p. 47 *et seq.*

We here take leave of this part of the case. We can only add in conclusion on this point:

For years subsequent to the execution of the treaties of 1866 the executive department of the Government adhered to the construction that the lands ceded by the Choctaws and Chickasaws under the treaty of 1866, like the lands ceded by the Creeks and Seminoles of that year, were ceded on certain specific trusts for the location thereon of friendly tribes of Indians, from Kansas and elsewhere, that the Government desired to locate thereon. The time when these opinions were pronounced imparts to this testimony the added force of contemporaneous exposition.

A construction thus established is not to be lightly departed from. In U. S. *vs.* Moore, 95th U. S., 760, the court say the construction given to a statute by those charged with the duty of executing it * * * ought not to be overruled without cogent reasons. The officers concerned are usually able men and masters of the subject. So also 12th Wheat., 206; U. S. *vs.* Pugh, 99th U. S., 265; Hahn *vs.* U. S., 107 U. S., 406. These authorities, adapting the language of the Supreme Court in 113th U. S., 571, to the case before us, justify us in adhering to the construction adopted by the officers of the executive department of the Government.

These constructions were placed on the treaty very soon after its execution.

Commissioners Cooley, Sells, and Parker, who were delegates at the Fort Smith conference in 1865, were the commissioners who represented the United States in the framing of the treaties of 1866. They knew the purposes and objects of the treaty, and they were then alive, and would have corrected these constructions had they not been correct.

Those who negotiated and signed said treaty were contemporaneous with the most of those who made this execu-

ive construction, and the officers making the construction hereinbefore recited could easily have obtained information as to the intention of the parties as expressed at the time of framing said treaty, and it is reasonable that if the construction made by the Government officials had not been in accordance with the intention of the parties as expressed and understood at the time that some mention would have been made of it.

THE OPENING OF LANDS TO SETTLEMENT.

But in course of time the Government desired to change its policy of preserving the Indian Territory exclusively for Indians and Indian freedmen. For years organized bands of white men had sought to enter the Indian Territory for the purpose of effecting a settlement on lands ceded for Indian purposes under the treaties of 1866. The Government became desirous now of opening these lands to white settlement. But the officials of the Government recognized that under its treaty obligations it was impossible to do this. Secretary Teller, in a communication to the President January 26, 1885, says:

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It is not denied that the Government set apart the Indian Territory for the exclusive use of the Indians, and *covenanted* that no others should reside therein. It is, however, within the power of the Government, *with the consent of the Indians interested*, to change this provision of the treaties so that these desirable unoccupied lands may be placed within the lawful reach of settlers. But until this is done the integrity of the treaties, heretofore made with the Indians, should be maintained, and the powers of the Government to the extent necessary should be exercised to keep intruders and all unauthorized persons off the lands (Report No. 3147, H. of R., 51st Cong., 1st session, pp. 25 and 26; Book of Docs. B).

From this it is apparent, as it is from the whole history of the question, that not a portion but the entire Indian

Territory had been set apart for the exclusive use of the Indians, and the Government had covenanted that no others should reside therein.

There were four treaties in existence, which were obstacles in the way of so changing this policy as to prevent the settlement of the western part of the Indian Territory by white men. They were the treaties with the Seminoles, the Choctaws and Chickasaws, the Creeks and the Cherokees. From all these tribes the Government acquired under these treaties the right to locate Indians on the lands, either ceded or agreed to be ceded, described in the treaties, and located in the western part of the Indian Territory. They were all four made, says Senator Dawes, "upon the same stipulated basis to which all these four tribes previously assented. One of the stipulations was that no white man, except Government officials and the like, should ever be permitted to enter this Territory to reside. But these treaties are all unlike in their phraseology. * * *" Further on he says:

> The reason why these deeds differ in language, under a common basis and for a common purpose, is because they had to deal with different Indians and with different reservations, different subject-matters, and they accommodated their language to those they were dealing with, the Government clearly understanding themselves, and the Indians also, that the purpose was to apply this land to the settlement of friendly Indians alone (Cong. Record, vol. 23, part 5, 52d Cong., 1st session, pp. 4086, 4087).

Now, in 1889, the United States, desiring to change its former policy so as to open these lands to white settlement, but recognizing that it could not do so under the binding force of these treaties "*without*," says Secretary Teller, "*the consent of the Indians interested*," proceeded to obtain this consent.

With this end in view, negotiations were opened with the Creeks, which resulted in an agreement whereby the Creeks agreed that the lands ceded under the treaty of 1866 should

entirely free from any limitation in respect to the use
l enjoyment thereof, and whereby the Creeks surrendered
d extinguished all claims of every kind and character to
d lands. This agreement was ratified by act of Congress
arch 1, 1889 (25th Stats., p. 757). The Government had
id the Creeks, at the rate of 30 cents an acre, for the land
quired under the treaty of 1866, $975,168. It now paid
em, under this agreement for this release, $2,280,857.19.
he agreement was made on a basis of an allowance of
.25 per acre for all lands wholly unassigned, $1.05 per
re for lands occupied by the Indians but not sold, and
educting in both cases the amount formerly paid of 30
ents per acre. (See Report House of Reps. 3147, 51st Cong.,
st session, pp. 13 and 14.)

Congress passed an act March 2, 1889 (25th Stat., 1004), providing for the acquisition of all equitable interest of the Seminoles, buying the same interest as that of the Creeks in the Seminole lands acquired *in trust* under the treaty of 1866. Under this act the Government acquired from the Seminoles these lands free from any limitation as to their use and enjoyment. The United States had paid for these lands in 1866, for use for Indian settlement, estimated at that time at 2,169,080 acres, 15 cents an acre, $325,362. The Government now paid for freeing these lands from any limitation as to use $1,912,942.02 on the same basis as that adopted in the Creek agreement. (See Report last cited. p. 14.)

By agreement with the Cherokees in 1891, the Government purchased all their interest, legal and equitable, in their lands in what was known as the Cherokee outlet, and paid for the same over eight million dollars, being at the rate of $1.42 per acre.

In March, 1891, Congress appropriated $2,991,450 to pay the Choctaws and Chickasaws for all their right, title, interest, and claim in and to that part of the leased district occupied by the Cheyennes and Arapahoes south of the

Canadian river, embracing, with the allotment of 96,000 acres of said tract to the Cheyennes and Arapahoes, 2,489,160 acres of said leased district. This was at the rate of $1.25 per acre.

The Choctaws and Chickasaws executed a satisfactory deed to this land, and the Government has paid the amount appropriated for the same. The Government has thus repeatedly recognized that on freeing these lands from the limitation as to their use for Indian purposes there remained to the grantors an equitable interest in the same, for which the Government must pay before the lands could be opened to white settlement. By agreements with the Creeks, Seminoles, Choctaws, and Chickasaws, $1.25 per acre has been recognized as a fair compensation for the title to these lands, and from the value so ascertained have been deducted the sums previously paid these nations for the acquisition of these lands for Indian purposes. Now, in the case of the purchase of these lands, the lands of the leased district, which had been occupied by the Cheyennes and Arapahoes, *no deduction was made on account of any such previous payments.*

There was a deduction from the number of acres in the leased district occupied by the Cheyennes and Arapahoes. The total number of acres so occupied was 2,489,160. It was agreed that there should be deducted from this amount the number of acres which were allotted to the Cheyennes and Arapahoes. It was estimated at the time the appropriation was made to pay the Choctaws and Chickasaws that there were 600 Cheyennes and Arapahoe allottees; and allowing each 160 acres, there would be 96,000 acres. This was deducted from the 2,489,160 acres, leaving 2,393,160 acres to be paid for by the Government. Subsequently it was ascertained that there were 844 allottees instead of 600, being an excess of 244 over and above the original estimate of 600. Allowing each of them 160 acres, at a valuation of $1.25 per acre, and we have the further sum of $48,800,

which was subsequently deducted from the amount paid the Choctaws and Chickasaws for their land. This error in the computation was corrected by a resolution passed by the fifty-second Congress. These deductions were assented to by the Choctaws and Chickasaws in the spirit of compromise; but, allowing these deductions, the Choctaws and Chickasaws were paid for so much of the leased district as had been occupied by the Cheyennes and Arapahoes at the same rate as had been paid the Creeks and Seminoles, of $1.25 per acre; but, we repeat, there was no deduction on account of any previous payments made to the Choctaws and Chickasaws for this land for Indian purposes, or in the case of the Creeks and Seminoles.

Here was a clear recognition, not only that there had never been any absolute cession of the leased district, but also an equally clear recognition that there *had never been a dollar paid for a cession of the leased district land.* If there had been, there would have been a deduction on account of the $300,000 mentioned in the third article of the treaty of 1866.

It is to be observed that the United States sold and conveyed tracts of land in the lands acquired under the treaties of 1866 from the Cherokees, Creeks, and Seminoles. The United States did not sell and convey any of the lands in the leased district acquired from the Choctaws and Chickasaws to any Indian tribe. They located Indian tribes and set apart for their use certain portions of this leased district. This was the case with the Cheyennes and Arapahoes. We have seen that this was the case with the Wichitas and affiliated bands; and it was equally true with the Kiowas, Comanches, and Apaches, as appears from the treaty of 1867 made with these tribes. (See Revision of Indian Treaties, pp. 312 and 318; 15th Stat., title treaties, 91 and 99.) The United States did not sell and convey, or pretend to sell and convey, a single foot of the leased district. They did not sell and convey because they had not paid for the cession,

neither $300,000 or any other sum. They did not sell and convey to these Indians, or any other *tribe of Indians, because, as the whole history of the negotiations and treaties in reference to the leased district shows, they had not paid a dollar for the cession of this land.* This shows why the Government paid the Choctaws and Chickasaws for the land occupied by the Cheyennes and Arapahoes, without any deduction whatever for previous payments, at the rate of $1.25 per acre, and why it must yet, in strict justice, pay at the same rate for the reservation of the Wichita and affiliated bands and the reservation of the Kiowas, Comanches, and Apaches.

But this appropriation to pay the Choctaws and Chickasaws for that portion of the leased district had not passed without some opposition. This opposition came from Secretary Noble, Secretary of the Interior under President Harrison. Contrary to all the previous rulings of his department, he took the ground that the lands ceded by the Choctaws and Chickasaws under the third article of the treaty of 1866 had been absolutely ceded; that they had been fully paid for the same, and that they were not entitled to any further compensation. His opinion in this respect was cited during the discussion pending the consideration of the appropriation, but notwithstanding this influence thus exerted by a high official of the administration, Congress, after full discussion, overwhelmingly repudiated his views and passed the bill, making appropriation for the payment of these lands. The bill containing this appropriation was approved March 3, 1891. That this opinion was entirely antagonistic to the history of the negotiations which resulted in the execution of the treaty of 1866 and to the previous rulings of the department, we have already clearly shown. But in order that there may be no mistake whatever on this point, we again refer to the remarks made by Mr. Teller, former Secretary of the Interior, who was entirely familiar with the whole matter. They were made on the 9th of May,

more than fourteen months after the passage of the priation bill of March 3, 1891. The remarks we have quoted in a previous part of this brief, but in the of these remarks he said:

repeat that this department had held from the time eaty was made, beginning with the declaration of the Com- ner of Indian Affairs, who made the treaty when the l was called, that the purpose of the cession of the lands put Indians on it, and not white men."

d again he said:

had never been contended for one minute, until within st two years, at least by anybody in the department that the Choctaws and Chickasaws) had been paid a single cent e land" (Cong. Record, vol. 23, part 5, 52d Cong., 1st on, pp. 4091 and 4092).

ese were two ex-Secretaries of the Interior, members of Senate at the time—ex-Secretary Vilas and ex-Secretary er—and they voted together, recognizing that the ctaws and Chickasaws should be paid for the land.

he right of the Choctaws and Chickasaws to payment for land had already been considered in the House of resentatives. The Committee on Indian Affairs in that use had reported a bill for the purchase of the absolute e of the Choctaws and Chickasaws to the entire leased trict, except Greer county, Texas, $6,211,714.65, the said trict, except Greer county, being ascertained by survey to ntain 6,201,663 acres. The discussion took place on the of December, 1890 (Cong. Record, vol. 22, part 1, 51st ng., 2d session, p. 183 *et seq.*).

The House did not at that time come to a vote on the ll. Acting Commissioner Belt, in his report on this very ll, found in House Report No. 3147, 51st Cong., 1st session, d said the claim for payment was presented prematurely. e took the ground, while admitting the justice and equity f the Choctaw and Chickasaw claim, that it did not accrue ntil it was proposed to open the lands to settlement under

the general land laws of the United States, and at that time the whole of the leased district was still used for Indian purposes; but afterwards, during the same session of Congress, the Cheyenne and Arapahoes agreement came up for consideration. It was then proposed to open to settlement so much of the leased district as was occupied by the Cheyennes and Arapahoes. The right of the Choctaws and Chickasaws to payment for so much of the leased district as was thus occupied then accrued. It was then proposed to amend this agreement by appropriating the necessary amount to pay the Choctaws and Chickasaws for an absolute title to these lands, so as to free them from any limitation as to the use to be made of them. It was to be expected that the opposition of the Secretary of the Interior would at least have some support; but after a very full and elaborate discussion the appropriation for the payment of the Choctaws and Chickasaws was carried in the Senate by a vote of 36 to 23, and on a test vote in the House it was carried by a vote of 102 to 70. Thus the opinion of Secretary Noble was fully and thoroughly repudiated.

But Congress did not merely appropriate money for the payment of the Choctaws and Chickasaws. The bill

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passed read:

And the sum of two million nine hundred and nine one thousand four hundred and fifty dollars, be, and the same is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to pay the Choctaw and Chickasaw Nations of Indians for all the right, title, interest and claim, which said nation of Indians may have in and to certain lands now occupied by the Cheyenne and Arapahoe Indians, under executive order; said lands lying south of the Canadian river, and now occupied by the Cheyenne and Arapahoe Indians; *said lands have been ceded in trust by article three of the treaty between the United States and the Choctaw and Chickasaw Nations of Indians*, which was concluded April twenty-eighth, eighteen hundred and sixty-six, and proclaimed on the tenth day of August of the same year, and whereof, etc.

Now, in this form the bill passed the Fifty-first Congress and was approved March 3, 1891. Now, what were the lands ceded by the third article of the treaty? The lands of the leased district, of which the land in controversy was a part. These lands were here acknowledged to have been ceded *in trust* by the Fifty-first Congress, and the act was approved by the President of the United States.

The President of the United States on the 17th of February, 1892, sent a message to the Senate and House of Representatives, to a *new* Congress, *the Fifty-second Congress*, giving his reasons for delaying the payment of said money, and in the course of his message expressing the opinion that said lands had not been ceded *in trust*.

"The declaratory act of 1891," says General Paine in his Supreme Court brief (pages 65 and 66), "is not merely conclusive as a legislative construction of the treaty of 1866, but also conclusive as an express acknowledgment of the trust by the trustee. Let us suppose that the statute of frauds is applicable to the case. The statute will be satisfied if the trust can be manifested or proved by any subsequent acknowledgment by the trustee, or by an express declaration or any memorandum to that effect, or by a letter under his hand, or by an affidavit, or by a recital in a bond or deed, or by a pamphlet written by the trustee, or by an entry in a bank-deposit book. The trust upon which the leased district was ceded to the United States is expressly acknowledged by the trustee in the act of 1891. The acknowledgment is made by those departments of the Government which are invested with the exclusive power to make such acknowledgments. It takes the form of an act of Congress approved by the President of the United States. It is impossible to conceive of a stronger case of the proof of a trust by the acknowledgment of the trustee. This acknowledgment was not revocable by any subsequent inconsistent action of Congress, and especially of a new Congress. It

permanently fastened upon the United States the character of trustee."

The message was referred to the Committee on Indian Affairs in the Senate and to the Committee on Indian Affairs in the House. The committee in the Senate submitted a lengthy report in answer to the President's views known as report No. 552, Fifty-second Congress, first session, and with the report the following resolution:

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Resolved: That for reasons set forth in the report of the Committee on Indian Affairs, upon the President's message of February 17th, 1892, upon the appropriation of March 3d, 1891, for payment to the Choctaw and Chickasaw Nations for their interest in the Cheyenne and Arapahoe reservations in the Indian Territory submitted with this resolution, that it is the opinion of the Senate that there is no sufficient reason for interference in the due execution of the law referred to.

The report of the committee after full investigation was unanimous, with one single exception.

After a most thorough, deliberate, and exhaustive discussion, commencing on the 27th of April and extending to the 9th of May, 1892, the Senate on the last-named day came to a vote. A compromise proposition was submitted in which, after declaring that it was the opinion of the Senate that there was no sufficient reason for interference with the due execution of the law, there was annexed a proviso in the following words:

Provided, however, That in the opinion of the Senate, the President should require the leases and the conveyances which shall be executed by the Choctaw and Chickasaw Nations of Indians mentioned in said appropriation, to contain a full and complete relinquishment of all the right, title, interest and claim of said nation of Indians in and to all the lands between the ninety-eighth and one hundredth meridian of west longitude, formerly owned by them, and of all claim to reimbursement and compensation for and on account of the same.

Here was a proposition that the amount provided under the act of the Fifty-first Congress to be paid for that portion of the leased district hitherto occupied by the Cheyennes and Arapahoes should be paid on condition that the Choctaws and Chickasaws should receive the same in full payment for the leased district. The proposed substitute was rejected by a vote of, yeas, 13; nays, 41. Two ex-Secretaries of the Interior, Messrs. Teller and Vilas, voted with the nays. Here was a distinct recognition that the Choctaw and Chickasaw Nations of Indians retained a right, title, interest, and claim to the balance of the leased district, as they had to that portion of the district which had been occupied by the Cheyennes and Arapahoes.

The object of this proviso was to prevent the Government from being committed to further payments on account of the balance of the leased district. It merely left that question an open question, so far as the Fifty-second Congress could make it so; but it could not in any wise impair the legal effect of the act of March 3, 1891. The act of March 3, 1891—the act of the Fifty-first Congress—still remains as an acknowledgment that the Government as trustee held the lands of the leased district *in trust*, nor could any action of the Fifty-second or any subsequent Congress impair this acknowledgment.

Before proceeding further, we beg respectfully to invite the attention of the court to Senate Report No. 552, Fifty-second Congress, first session. This is the report made on the President's special message of February 17, 1892, giving his reasons for delaying the execution of the law.

General Paine has quoted very extensively in his brief, pages 36 to 44, from it, but it is so full and exhaustive, both in its reply to the objections set forth in the President's message, and so forcibly presents the rights and claims of the Choctaws and Chickasaws in and to the leased district, that we would do injustice to the court and ourselves if we simply presented extracts from it. The large vote by which the

appropriation was carried, as well as the large vote by which the resolution on the President's message was adopted, is the highest tribute to its merit. We respectfully invite the careful consideration of the court to this very able report.

However eminent lawyers might differ—as Senator George of Mississippi, who held that the interest of the Choctaws and Chickasaws was a legal interest, or Senator Dawes of Massachusetts, who held that their interest was an equitable interest—these differences did not prevent a concurrence in the opinion that good conscience required that they should be paid for this land.

I have felt that the court should have this brief statement of the action of Congress first on the subject of the appropriation, and, secondly, of the subsequent action before payment was finally made. The sum and substance of what the defendants say in their brief concerning this congressional action is that it was based on error, and that Congress did not know what they were doing (p. 102 *et seq.*; Record, p. 566).

The question then recurred on the resolution reported by the Committee on Indian Affairs, and the vote was announced—yeas, 43; nays, 13—the two ex-Secretaries of the Interior voting in the affirmative; and so the resolution was adopted (Cong. Record, 52d Cong., 1st session, p. 4093).

The House committee reported—unanimously, I believe—substantially the same resolution, and accompanied it by the same report. It was not taken up in the House until December 17, 1892. Before considering it, the chairman of the Committee on Indian Affairs called attention to the error in computing the number of Cheyenne and Arapahoe allottees, hitherto mentioned in this brief. He then submitted the following resolution:

Resolved by the Senate and House of Representatives, That the Secretary of the Treasury be, and he is hereby, directed to retain and cover back into the Treasury $48,800 of the

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appropriation made by Congress to pay the Choctaw and Chickasaw tribes of Indians for their interest in land of the Cheyenne and Arapahoe reservation, dated March 3d, 1891, which amount has been ascertained by a recount of the allottees of said Cheyennes and Arapahoes, to be by that amount more than is due the said Choctaws and Chickasaws upon the purchase and settlement for their said interest.

This resolution was passed, and the House then proceeded to consider the resolution of the committee, which was read as follows:

Resolved, That for reasons set forth in the report of the Committee on Indian Affairs upon the President's message of February 17th, 1892, upon the appropriation of March 3d, 1891, for payment to the Choctaw and Chickasaw Nation for their interest in the Cheyenne and Arapahoe reservation, submitted with this resolution, it is the opinion of the House of Representatives that there is no sufficient reason for interference in the due execution of the law referred to.

After a considerable debate thereon in Committee of the Whole House the resolution was reported back to the House, and the question being taken on the resolution, it was passed—yeas, 163; nays, 47; and thus the controversy was terminated.

It is proper to add that the resolution correcting the error in computation to the amount of $48,800 was amended in the Senate by adding the following proviso, which was subsequently concurred in by the House:

Provided, however, That neither the passage of the original act of appropriations to pay the Choctaw and Chickasaw tribes of Indians for their interest in the lands of the Cheyenne and Arapahoe reservations, dated March third, eighteen hundred and ninety-one, nor of this resolution shall be held in any way to commit the Government to the payment of any further sums to the Choctaw and Chickasaw Indians for any alleged interest in the remainder of the lands, situate in what is commonly known and called the leased district.

But in making the appropriation for the purchase of that portion of the leased district occupied by the Cheyennes and Arapahoes, Congress did more than make a simple appropriation.

It declared that said lands which had been ceded by article 3 of the treaty between the United States and the Choctaws and Chickasaws, April 28, 1866, and proclaimed on the tenth day of August of the same year, were not ceded absolutely, but had been ceded *in trust*. (See act March 3, 1891.) This was not a mere declaration of opinion. This statute of March, 1891, is *in pari materia* with article 3 of the treaty of 1866. They are to be construed together as if this language declaring that the cession of the lands had been made *in trust* had been originally incorporated in article 3 of the treaty of 1866. It was a subject over which Congress had absolute control, being vested by the Constitution with supreme control over the public lands and over the Indians. It imposed on all these lands the nature and character of *trust lands*. Treaties with Indians not being made since 1871, Congress deals with the subject direct.

The language of the act is that the amount named "is hereby appropriated to pay the Choctaw and Chickasaw Nations of Indians for all the right, title, interest, and claim which said nations of Indians may have in and to certain lands now occupied by the Cheyenne and Arapahoe Indians under executive order, said lands lying south of the Canadian river, and now occupied by the said Cheyenne and Arapahoe Indians, said lands have been ceded *in trust* by article 3 of the treaty between the United States and the said Choctaw and Chickasaw Nations of Indians, which was concluded April 28th, eighteen hundred and sixty-six, and proclaimed on the tenth day of August of the same year."

Now, the words *in trust* apply here to all the lands in the leased district. The lands ceded by article 3 of the treaty of 1866 were the lands known as the leased district. That portion of the leased district occupied as the Cheyenne and Arapahoe reservation was not ceded by one instrument, and the reservation of the Wichita and affiliated bands by another, and the reservation occupied by the Kiowa, Comanche, and Apache Indians by still another. They were all ceded by the third article of the treaty of 1866. Each and every acre of land was ceded by the same article. If the Cheyenne and Arapahoe reservation was ceded absolutely, then every other part of the leased district was ceded absolutely. If the Cheyenne and Arapahoe reservation, a part of the leased district, was ceded *in trust*, then the reservation of the Wichitas and affiliated bands and the reservation of the Kiowas, Comanches, and Apaches, as the other parts of the said leased district, were also ceded *in trust*.

Now, this interpretation of the character of the cession under article 3 of the treaty of 1866 was in perfect conformity with the purposes for which this land was ceded, as we have seen throughout the whole history of the negotiations preceding the execution of the treaty, of the treaty itself, and of the uniform construction put upon that article of the treaty by the action of the Government thereunder and of all the officials of the Indian departments up to the action of Secretary Noble.

The Committee on Indian Affairs in the House had adopted the same interpretation when they reported the bill for the purchase of the entire leased district. The bill read:

Be it enacted, etc., "That the sum of $6,211,714.65 be and the same is hereby appropriated out of any money in the Treasury not otherwise appropriated, to pay in full, the Choctaw and Chickasaw Nations of Indians for all the right to the interest and claim which said nations of Indians have in and to certain lands, ceded *in trust* by article 3 of the treaty between the United States and said nation of Indians,

which was concluded April 28th, 1866, and proclaimed on the 10th day of August the same year, except Greer county, so called, which lands exclusive of said Greer county are ascertained by survey to contain 6,291,663 acres" (Cong. Record, p. 183, 51st Cong., 2d session, vol. 22, part 1).

When they were inserted in the appropriation bill approved March 3, 1891, they had been carefully considered. The House Committee on Indian Affairs, as we have just seen, had already reported the bill containing the declaration that the cession of article 3 of the treaty of April 28, 1866, was a cession *in trust*. When Congress passed the bill approved March 3, 1891, it declared that the cession under article 3 of the treaty of April 28, 1866, was a cession *in trust*. This treaty was a treaty, but also under our Constitution it was the law of the land. When a treaty operates of itself without the aid of legislative provision, it is regarded in courts of justice as equivalent to an act of the legislature (Foster *vs.* Neilson, 2d Peters, 314). Congress, with full power and authority over the subject, affixed this interpretation to the treaty of April 28, 1866, to this law of the land, and affixed it with the executive sanction of March 3, 1891. This interpretation became incorporated into said article 3 of said treaty as much as if it had been inserted there originally. It was now a part of the deed, and no subsequent legislation could change it. The parties to it were bound by it just as much as if originally inserted in it. Here was an insertion in the original contract of what Congress believed to have always been a part of it, and it was a legislative interpretation of the true meaning, the tenor, and effect of article 3 of the treaty of April 28, 1866.

That this is a correct statement of the law of this case we refer to Endlich on Interpretation of Statutes, p. 510, § 365, where it is said:

A construction put upon an act of the legislature itself, by means of a provision embodied in the same, that it shall or shall not be construed in a certain designated manner, is

binding upon the court, although the latter without such a direction would have understood the language to mean something different * * * *Moreover a statute declaratory of a former one has the same effect upon the construction of such former act, in the absence of intervening rights, as if the declaratory act has been embodied in the original act at the time of its passage.* (See also Sutherland on Construction of Statutes, p. 306, § 231.) A provision which is special, by pointing to a particular act and declaring for what definite purpose it was enacted, or defining certain words or phrases, has the fullest effect. It is a part of the law, and must be construed and applied accordingly, and the act will have a construction, and the words and phrases a meaning in harmony with the defining provisions, even though otherwise they would have a different effect. (See also State *vs.* S. & S. Orphan Home, 37 Ohio St., 275; Philadelphia, etc., R. R. Co. *vs.* Catawissa R. R. Co., 53 Pa. Stat., 20; Hankins *vs.* The People, 106 Ill., 628.)

In the case of the State *vs.* Soldiers and Sailors' Orphan Home, 37 Ohio, 275, there were two acts on the same subject-matter, and in that case the court said:

Whatever may have been the original meaning of the act, the effect of the adoption of this clause was to incorporate it with the original act, and in the absence of any intervening rights to give to the act the same meaning and effect, as if the clause had been embodied in it, at the time of its passage.

But the legislative interpretation of Congress of a treaty is even more binding than such an interpretation of a previous act of Congress. An act of Congress declaring what is the true meaning of a treaty is of peculiarly binding force. Speaking of treaties, Sedgwick on the Construction of Statutory and Constitutional Law, pp. 386, 387, says that:

It is important to notice the rule, that in the construction of this class of documents the judiciary, in one respect, do not occupy the same position, nor hold the same language that they do in regard to other matters of written law Whenever the nation by its properly constituted agents has

declared its interpretation of a treaty, that interpretation becomes binding on the courts. The Supreme Court of the United States has said: "However individual judges might construe a treaty, it is the duty of the court to confine itself to the will of the legislature, if that will has been clearly expressed; the courts cannot pronounce the course of their own nation erroneous."

This much we feel that we ought to say upon this important branch of this question. Much more we could say. But more we do not propose to say, as we have the brief on this point of the late Judge Shellabarger, to whose labors we are much indebted, and which will be presented and enforced by our associate, Judge Wilson. Besides, General Paine, in his Supreme Court Brief, page 63 *et seq.*, has cited a number of authorities on this question.

But, independent of the question of legislative interpretation, the question naturally arises, if the executive officials of the Government understood that these lands were ceded *in trust* for the benefit of the Choctaws and Chickasaws, and if now the Congress of the United States placed this construction on the third article of the treaty of 1866, how else could the Choctaws and Chickasaws have understood it?

INTERPRETATION OF INDIAN TREATIES.

We have hitherto invoked in the interpretation of this treaty between the United States and the Choctaws and Chickasaws only those rules which govern in the construction of contracts between parties who are on terms of equality with each other. In such cases all that the law requires is the observance by both parties of *bona fides*. But in a contract between parties occupying the relation of these Indian tribes and the Government of the United States, the relations between a superior and inferior, the relations between a guardian and ward, between a great and powerful nation and a weak and defenseless people, here equity and

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justice require that the strong should observe towards the weak, not merely *bona fides*, but what the civil law happily termed *uberrima fides*. Under this rule the agents of the United States, in negotiating the treaties, were bound to have communicated to the Indians every species of information which could have affected their minds.

The Indians were a careless people, unacquainted with business methods, the making of contracts or the formation of treaties. They were dealing with officials of the United States, in whom they reposed confidence and to whom they looked for protection. They had just been informed that the Government desired the cession of this land for Indian tribes from Kansas and elsewhere, whom the Government desired to locate thereon; they were therefore entirely off their guard in making an absolute cession of the land, which could by any possibility of construction be afterwards used for white settlement.

Under such circumstances, to construe this cession into an absolute and unqualified cession would be a breach of confidence, a breach of trust, when the law requires *uberrima fides* to be observed towards them.

But the Supreme Court of the United States has passed on this question, and passed on it in a manner not only in conformity with the great moral principles laid down in these legal authorities, but in a manner which renders it utterly impossible to entertain the idea that under the treaty of 1866 the Choctaws and Chickasaws ever made an absolute cession of these lands.

In 5th Wallace, 737, in the case of the Kansas Indians, it is held that rules of interpretation favorable to the Indian tribes are to be adopted in construing our treaties with them; and on page 760 Justice Davis, who delivered the opinion of the court, adopts the language of C. J. Marshall, used in 6th Peters, 582, where he says: A.R. 5

The language used in treaties with the Indians should never be construed to their prejudice, if words be made use

of, which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty.

And again, in the case of The Choctaw Nation *vs.* The United States, 119th U. S., 1, when Justice Stanley Matthews, pronouncing the opinion of the court, says, on page 27:

A.R. 53. This quotation is not sufficiently full. See A.R. 53 & 54.

The United States is a sovereign nation, not suable in any court except by its own consent, and upon such terms and conditions as may accompany that consent, and is not subject to any municipal law. Its government is limited only by its own Constitution, and the nation is subject to no law, but the law of nations. On the other hand, the Choctaw Nation falls within the description, in the terms of our Constitution, not of an independent State, or sovereign nation, but of an Indian tribe. As such it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the Government of the United States, although from the nature of the case, subject to the power and authority of the laws of the United States, when Congress should choose, as it did determine in the act of March 3d, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative powers.

As it was said by this court recently in the case of The United States *vs.* Kagma, 118 U. S., 375, 383:

These Indian tribes are the wards of the nation; they are communities dependent on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From this very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection and with it the power. This has always been recognized by the Executive and by Congress and by this court whenever the question has arisen.

Justice Matthews, after making this quotation, continues: It had accordingly been said in the case of Worcester *vs.* Georgia, 6 Peters, 515. 583:

> The language used in the treaties with the Indians should never be construed to their prejudice. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning should form the rule of construction.

Now, this is the rule of justice, of equity, of honesty laid down by the Supreme Court. I put it to this court in all candor, if Carl Schurz, Secretary Kirkwood, and Secretary Teller understood this treaty as a mere conveyance of these lands *in trust*, for certain specific purposes, how else can you expect the poor defenceless Indian to understand it, and if he so understood it, then, under the decision of the Supreme Court, his understanding of it becomes the rule of interpretation which is to explain and control its meaning.

But it is contended that these decisions were made in reference to treaties of a much earlier date, and that they have no application to the treaty of 1866. The main reason assigned for this contention is that in 1866 the Choctaws were no longer an unlettered and ignorant, but were an educated and intelligent people; but such reasons are founded on a clear misapprehension of what is the real reason on which the rule for the interpretation of Indian treaties is based. *This fundamental reason on which this rule of interpretation is founded* is "that the recognized relation between the parties is that between a superior and inferior. * * * That the parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right" (119 U. S., 28). The fact that the Choctaws and Chickasaws were no longer an unlettered people could not deprive them of the benefit of this rule of interpretation if the relation of the parties were still that of a superior and inferior. Where the benefit of the rule is

extended to an unlettered people it is only because a want of acquaintance with letters made them a dependent people; but in fact, while many of the Choctaws and Chickasaws had made considerable advances in education, they were still as a mass an unlettered people.

Whatever may be true as regards the mere fact of whether they were or not an unlettered people, never was the inequality between these tribes and the United States more strongly manifest than when their representatives met the commissioners of the United States in council at Fort Smith in 1865. It was at the end of a long and destructive war, in which, by force of circumstances, they had been compelled to participate. They came out of that war not only subdued, but utterly ruined. They were told by the United States commissioners at the very opening of the council that they had forfeited all their rights and interests and *were at the mercy of the Government*. Were these tribes in such a situation as to contract on terms of equality with a power like that of the United States? Never in all their history were these wards of the nation so much under the protection and at the same time within the power of their guardian as at this period. *Here was absolute dependence* and *absolute power*. The Government, under pressing necessity of providing for Indian tribes from Kansas and elsewhere, desired and demanded of these people a cession of part of their lands for Indian settlement, and for Indian settlement only. It is not too much to say that here it was the absolute duty of the guardian to have guarded the ward against signing a treaty for an unconditional and unqualified cession. The ward, under the circumstances, was reposing perfect trust and confidence in the Government, its guardian, for guidance and protection.

Besides, these Indian treaties are made in furtherance of the policy and interests of the Government, and hence the treaties must be so construed as was understood by these people. The court thus gives expression to this rule of

interpretation in 119 U. S., 27. The recognized relation between the parties is that between a superior and an inferior, whereby the latter is placed under the control of the former, and which, while it authorizes the adoption on the part of the United States of such a policy as their public interests may dictate, recognizes on the other hand such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws.

Now, here, in 1866, the United States, the superior power, is making a treaty with an inferior power under its care and its protection, and a treaty in furtherance of its own policy and its own interests. Clearly the circumstances bring this case, without regard to whether the Choctaws were or not an unlettered people, within the rule laid down for the interpretation of Indian treaties.

Upon this point the Court of Claims (page 58 of their decision, page 407 of Transcript of Record) says:

"Advancements in education and learning had undoubtedly been made. * * *

"Complainant nations had governments of their own, * * * but agencies from our own Government were maintained among the nations, with power that restricted them to a degree, and our courts exercised jurisdiction over their persons. As nations and people they were dependent communities, at least. Illiteracy largely prevailed, if history be written from truthful sources, and the demoralization incident to the close of a great war must have had its effect upon people who, by its results, were made more deeply sensible *than ever before* that they were dependent upon the United States for every personal and political right that they might thereafter enjoy. If any one thing has been

settled in our judicial history it is that the Indians ar
wards of the nation. The relation of guardian and
between the United States and the Choctaws and Ch
saws existed when their last treaty was executed, and
must be such an interpretation of their acts as justice
reason demand where power is exerted by the strong
those to whom they owe care and protection."

The language of Chief Justice Marshall in Worces
Georgia has been so often and lately applied, the rul
not be ignored in the construction of a treaty exe
by the claimants a generation ago, whether their a
considered as the acts of an ignorant people or
of a people helpless and otherwise at a disadva
(See the Kansas Indians, 5th Wall., 737, 760; U.
Kagama, 118 *ib.*, 375–383; Choctaw Nation *vs.* U. S
ib., 1–28.)

There are many of the relations of life where e
acting on the same principle which governs in the co
tion of Indian treaties, where confidence is actually r
by one party in the other, will, in the aid of good
come to the relief of one of these parties as again
other. Such are the relations of guardian and ward
and attorney, principal and agent, and insured and i
Here, as illustrated in the case of insured and insur
the duty of the insured to communicate every fact
insurer which could affect his mind in entering i
contract (3d Kent. 285).

"Where such relations exist," says Judge Story, "c
equity, acting upon this superinduced ground, in aid
morals, will not suffer one party, standing in a situa
which he can avoid himself against the other, to de
vantage from that circumstance, for it is founded on a
of confidence" (Story's Equity, vol. 1, § 308).

We believe that the Government did so act towar
people and so represented to them its desire for th
sition of its land *for Indian purposes only*, that they

when they executed the treaty of April 28, 1866, that they ceded the leased district *in trust* for the settlement thereon of friendly tribes of Indians only, with the possibility, in case of necessity, of Indian freedmen.

The whole history of the negotiation shows that this was the case.

It was evidenced in the submission of the fifth stipulation at Fort Smith in September, 1865, to the Choctaws and Chickasaws, as well as to the Creeks, Seminoles, and Cherokees; in the submission of the fourth article of a draft of a treaty by the United States commissioners to the Choctaws and Chickasaws; in the absence of any evidence in the record showing that any other information on the subject was ever furnished the Choctaws and Chickasaws; in the report of Indian Commissioner Cooley in 1866, concerning the purposes of the treaty executed with them; in the recitals in the treaty with the Delawares in July, 1866, as to the purposes for which the lands had been acquired; in the location of Indian tribes in the leased district in pursuance of the treaty; in the oft-repeated expressions of opinions of executive officials of the Government, and in the declaration in the act of March 3, 1891, acknowledging that the Government, as trustee, held these lands *in trust*.

THE GREAT INJUSTICE OF CONSTRUING THE CESSION OF 1866 AS AN ABSOLUTE CESSION.

But we cannot leave this question without calling attention to the great injustice which would be done by treating the cession of 1866 as an absolute cession. It will be recollected that by the ninth article of the treaty of 1855 the Choctaws forever quitclaimed and relinquished to the United States all their right, title, and interest in and to all lands west of the 100th degree of west longitude, a tract of country containing an area of 6,589,440 acres. It will be recollected that the title to this tract had been acquired by

the Choctaws from the United States, under the treaty of October 18, 1820, in exchange for a portion of their lands east of the Mississippi, conveyed by them to the United States, and that they had been deprived of the possession of this large tract by the cession of the same by the United States to Spain, by a subsequent treaty ratified in February, 1821. By the same article, the Choctaws and Chickasaws had leased to the United States another large tract of land for Indian purposes, containing an area of 7,713,239 acres. By the tenth article of the treaty of 1855, it was provided that the United States should pay for the relinquishment and for the lease $800,000, in the proportion of $600,000 to the Choctaws and $200,000 to the Chickasaws. There was no apportionment of how much was to be paid for the relinquishment nor how much for the lease.

But if we appropriate in equity the whole $800,000 to the extinguishment of the title to the lands west of 100th degree of west longitude it will not amount to 12½ cents an acre. Then the United States would have acquired 7,713,239 acres under the lease without the payment of a dollar. If we apply $400,000 on the extinguishment of the claim to the land west of 100 degrees, then the United States would have extinguished this claim at less than 6¼ cents an acre, and if we apply the remaining $400,000 on the lease, then the United States would have paid for the lease a rental value per year of less than one-half a cent an acre for eleven years, from the date of the treaty of 1855 to the date of the treaty of 1866. Certainly no part of this sum of $800,000 could in equity be applied on the purchase-money of the land. When the land was ceded, in 1866, not a dollar was paid on account of the land. When the Cheyenne and Arapahoe reservation was opened to settlement the Government paid the Choctaws and Chickasaws $1.25 per acre. After deducting allotments for the Cheyennes and Arapahoes that reservation amounted to 2,489,160 acres.

Deducting this, and we have over 5,200,000 acres as the

balance of the leased district. Of this residue of the leased district the reservation of the Wichitas and affiliated bands, amounting to 743,610 acres, is a part. Now, if this cession of 1866 is held to be an absolute and unqualified cession, then the Government acquires not merely the reservation of the Wichitas and affiliated bands without the payment of a dollar, but also all the balance of the leased district. This land is as valuable as the surplus lands of the Creeks and the Seminoles, acquired in 1889, or the surplus lands of the Cherokees, in 1892. The Government paid the Creeks and Seminoles $1.25 per acre and the Cherokees $1.42 per acre. The entire leased district was valued at $5 an acre according to an estimate placed on the same submitted in Senate Report 552, 52d Congress, 1st session, page 10. This would amount to forty millions of dollars. Is it to be held that the Government is to acquire the residue of this valuable Leased District land, amounting to more than five millions of acres, without the payment of a dollar? But this seems to be the consequence if this cession of 1866 is to be held to be an absolute and unqualified cession. It is impossible to conceive that these people ever assented to any such cession. It is utterly inconceivable that the Choctaws and Chickasaws could make such a bargain, and it is utterly untrue that any such bargain was ever made. Such monstrous injustice could never be tolerated at any time in any country.

Even the counsel on the other side see this injustice if the cession is to be treated as an absolute cession, and they seek to explain it on the ground that it was a penalty for their having engaged in the rebellion. These 5,200,000 acres are to be appropriated without the payment of a dollar. Here were a people incapable of committing treason, without protection on the part of the United States at the time, who participated in the rebellion, and they are to be punished with a confiscation of 5,200,000 acres of land. The war had closed. Horace Greeley said, "The hour of victory

is the hour of magnanimity." The great captain of the Union armies said, "Let us have peace." That was the policy of the Government towards the people of the South. Not a foot of land belonging to the great leaders of the rebellion was taken, and yet we are told by the counsel for the Government and the counsel for the Wichitas and affiliated bands that, as a penalty for participation in this rebellion, a great and powerful Government will take from this weak and defenseless people 5,200,000 acres of land.

I will not believe, nor do I for a moment suppose that this court will believe, that a great and powerful, aye, an omnipotent Government, so far as these Choctaws and Chickasaws were concerned, would abstain from confiscation in the case of the white people of the South, but would impose its pains and penalties on the weak and defenseless red men of the West.

But it was not an absolute cession, and we think we have said enough to show that it was a cession for the purpose of locating on these lands friendly tribes from Kansas and elsewhere, in addition to the Wichitas and other bands of Indians, whom the Government was permitted to locate thereon by the treaty of 1855, with a reversionary interest to the Choctaws and Chickasaws whenever the Government should attempt to divert the lands from the purposes for which they were leased in 1855 or ceded in 1866.

Our assignment of error to the decision of the Court of Claims is based on the ground that, if the lands were ceded in trust, the court erred in decreeing one hundred and sixty acres of land to each member of the Wichita and affiliated bands. The treaty of 1855 provided not for the location of individual Indians on the land leased, but tribes. The demand made in the fifth requirement at the Fort Smith conference was a cession of land for the location of Indian tribes thereon. In the official report the fifth stipulation reads:

"A portion of the lands hitherto owned and occupied by you, must be set apart for the friendly tribes, now in Kansas or elsewhere, on such terms as may be agreed upon by the parties, and approved by the Government, or such as may be fixed by the Government."

The fifth article of the unsigned treaty of 1865 contemplated a modification of the ninth article of the treaty of 1855, so as to permit the location of other tribes in the leased district. Clearly, only tribal occupancy was contemplated; but the Court of Claims seek to provide for Indians in their individual capacity, upon a dissolution of the tribes. This was never contemplated, and to this extent, we think, the court erred.

We have thus submitted, in all candor, the grounds on which are based in this controversy the claims, the rights and equities of the Choctaws and Chickasaws. In the effort to sustain them we have only resorted to the history of the country, to public official documents, and to such testimony as enlightened and impartial tribunals always recognize and approve. We have invoked only such principles of law as the highest courts of the land have laid down as guides in the investigation of human affairs and human conduct. The conclusions we have drawn are before the court. Whatever may be the rights and equities of others, the Wichitas, the Caddoes, the Wacoes, or any other tribe or people, the rights and equities of the Choctaws and Chickasaws as between them and the United States in this controversy must still remain. They arise out of the relations between them and the United States, the treaties into which they have entered, and the history of the country as affecting these tribes and the Government for more than three-quarters of a century. Whatever may be the rights of others; however defective may be the title which the United States conveyed to us under the treaties of 1820, 1825, and 1830; however encumbered by any claim of any tribes based on a title of occupancy; whatever defect may

be in the patent from the United States to the Choctaw Nation; whatever rights other Indians may by any possibility have under any agreements between them and the United States—these our rights and equities still subsist. The United States is still under solemn obligations to secure them to us, and, failing to do so, to render us ample compensation for all the loss which we thereby sustain.

ANSWER OF THE DEFENDANT INDIANS.

This brings us to the consideration of the answer of the defendant Indians. In this answer these defendants first deny the rights and equities of the Choctaws and Chickasaws. These we have already considered sufficiently in the argument which we have had the honor to submit, and we do not propose again to return to this branch of the question.

The answer then asserts an aboriginal right of occupancy in the Wichitas in the land in controversy, which they say has never been extinguished, and is subject only to the rights acquired therein by the affiliated bands, through their joint occupancy of the same with the Wichitas since 1859.

They assert that the land conveyed to the Choctaws by the treaty of October 18, 1820, was part of a tract conveyed to the United States by the Quapaws by treaty of 1818 (7th Stats., 176), but they say that the aboriginal right of possession was not in the Quapaws, and therefore the United States did not acquire title under said treaty, and therefore the United States could not convey title to the Choctaws by the treaty of 1820.

A.R. 8

A.R. 9

They assert also that their aboriginal rights were acknowledged by the United States and the Choctaws by the treaty of August 24, 1835 (7th Stat., 474).

A.R. 16

They also assert that the so-called leased district was confirmed to them by a certain agreement, which was an

al agreement, which they allege was made at Fort Arbuckle
1859.

They also place some reliance on what is known as the A.R.38
nratified agreement of 1872.

We have seen, according to census bulletin 1890, No. 25, that the Wichitas and affiliated bands do not exceed 1,100 people, of whom not more than 175 are Wichitas. They have never exceeded over 300 in number. These Wichitas are without any records or memorials of any kind, and were until a very late period naked savages—in the very lowest state (Report of John Sibley to Secretary of War, 1805; American State Papers, vol. 1st, Indian Affairs, p. 721, cited on Paine's Brief, pp. 82, 83; Def't Indian Brief, p. 141). They were found generally naked, 1834 (Dodge Journal, filed in this case). They were still naked savages, 1869 (Report of Commissioner of Indian Affairs, 1869, p. 29). It has been well said that the first step in elevating the savage from the lowest condition is to put a shirt on him. They had not even taken the first step within this historical period of sixty-four years. Now, these are the people in whom it is claimed exists the aboriginal right of occupancy to an immense body of land, sufficient for an empire, which embraces the land in controversy.

Now, what do we understand by the aboriginal right of occupancy? This aboriginal right of occupancy is a principle recognized by the law of nations. It has been thus stated:

> It is a fundamental principle of the law of nations that the aboriginal inhabitants of the soil possess only a right of occupancy, and *the measure of that occupancy* is determined by the extent of their wants and of their capacity to use the soil to supply those wants (1 Grotius, 2 C., 11; 2 Black. Com., 2).

In the brief of counsel for defendant Indians, in the Court of Claims (pp. 37 and 38), a number of decisions are

quoted to the effect that the aboriginal title in this country exists in the Indians, and that is one of occupancy only, the United States holding the fee. But in these decisions as quoted the courts are speaking of the aboriginal right of occupancy existing in the Indians generally—*of Indians as a race.* They are not discussing the question of the aboriginal right of occupancy as existing in one tribe of Indians to a particular tract of country independently of the right of any other tribe to the same tract of country. And this is the question we have before us. Did the aboriginal right of occupancy in the land in controversy exist in these Wichitas to the exclusion of any other tribe or band of Indians?

In the excellent review of the origin of title to lands in America, Chancellor KENT, in the third volume of his Commentaries, p. 387, says:

A.R. 48 & 49

There has been considerable diversity of opinion, and much ingenious speculation on the claim of right to this country by the Europeans, founded on the title by discovery. We have seen that with respect to the English colonists in America, the claim was modified, and much of its extravagance destroyed by conceding to the native tribes, their political rights and privileges, as dependent allies, and their qualified title to the soil. As far as Indian rights and territories were defined, and acknowledged by the whites by treaty, there was no question in the case, for the whites were bound by the moral and national obligations of contract and good faith, and as far as Indian nations had formed themselves into regular organized governments, *within reasonable and definite limits*, necessary for the hunter State there would seem to be no ground to deny the absolute nature of their territorial and political rights. But beyond these points our colonial ancestors were not willing to go

And beyond this rule, if so far, I do not think we, the descendants, have been willing to go. We are willing to concede an aboriginal right of occupancy in Indians generally—in Indians as a race, because there was no oth

race on the continent at the discovery of America by the white man; but when an aboriginal right is asserted in a particular tribe, we cannot and do not concede it unless we find in that tribe some sort of governmental organization and its claims to aboriginal occupancy asserted to an extent of territory within reasonable and definite limits and its right recognized and acknowledged by others. I apprehend that when the courts have been called on to pass on this question as regards the rights of tribes it was concerning the rights of tribes who had some sort of governmental organization and whose claims to territory were within ascertained and reasonable limits. Such was the case with the Cherokees, Creeks, Choctaws, and Chickasaws, whose definite and ascertained territorial limits in their ancient homes east of the Mississippi river were recognized from the earliest formation of our Government. We may therefore concede an aboriginal right of occupancy in the Indians as a race, even to the whole continent, there being no other race dwelling on the continent; but we cannot recognize a right in a particular tribe except to definite territory, within reasonable and ascertained boundaries, measured by the wants of the tribe and their capacity to use the soil to supply those wants, and we must find in the tribe some sort of governmental organization through which the right can be asserted and by which it has been maintained. A loose and uncertain claim of aboriginal right in a particular tribe, unrecognized by other tribes or nations, cannot well be reasonably asserted in any court.

We therefore conclude that a claim to territory based on an aboriginal right of occupancy by a particular tribe cannot be asserted in a court of justice, unless it is shown by proper evidence what are the definite limits of the territory claimed with reasonable certainty; that the claim to the territory so described is an exclusive claim; that the territory described has been held adversely, and that the claim

has been recognized and acknowledged by other surrounding tribes or nations.

Now, we are not here to contend that the Quapaws had a perfect aboriginal right to the land conveyed to the United States by the Quapaw treaty of 1818. We have not sufficient evidence to decide this question.

The Choctaws did not accept a transfer of the title which the United States acquired from the Quapaws. The Choctaws acquired their title by exchanging lands, wholly unencumbered, in the State of Mississippi, for lands, wholly unencumbered, west of the Mississippi river, *without any reference to any right which the Quapaws or any other tribe had or might have had therein. The Choctaws therefore look alone to the United States for protection of their title. But while we make no such claim for the Quapaws, we think, so far as the historical record discloses, the aboriginal right of occupancy did not exist in the Wichitas, but the evidence strongly indicates in the Quapaws.*

A.R. 8

In 1818 the United States purchased by treaty (see 7th Stat., p. 176) from the Quapaws the aboriginal title of occupation. This was fifteen years after the acquisition of Louisiana from France. The agents and officials of the United States Government had been for years exploring this region. It was the interest of the Government to ascertain and know who possessed this aboriginal title of occupation. Care and caution were required that they should make this treaty with the true owners of the possessory title. A map of the country accompanied the treaty. It was submitted to the United States Senate. No objection was made by the Wichitas or any other people. The treaty was ratified by the Senate and proclaimed by the President. This treaty, under the Constitution, is a part of the supreme law of the land, and as such must be respected and enforced by the courts of the United States.

Accompanying the treaty was a letter from the United States commissioners who executed it—William Clark and

st Chouteau. A copy of this letter is filed with the nce in this case. It bears date September 6, 1818. letter states that the country ceded is a large tract h at all times heretofore has been considered their rty (property of the Quapaws), as well by the former rnments as by the Osages, their neighbors), embracing ie white settlements in that quarter and far to the west em. There is no mention made of any such people as Wichitas in this letter (American State Papers, vol. 11, Affairs, p. 177).

is to be observed that this treaty is made with the chiefs warriors of said nation; that the territory ceded, which n well-defined limits, has been acknowledged as the perty of the Quapaws by the previous governments of in and France, as well as by their neighbors, the Osages. w, this treaty, before its passage, passed the scrutiny of United States Senate.

Now, I do not hesitate to say that while this evidence is t sufficient to satisfy my mind as to the aboriginal right the Quapaws to this land, I do not find in the whole mass testimony referred to by the counsel for defendant Indians ny testimony in favor of the Wichitas which will compare ith this testimony of Clark and Chouteau in favor of the laim of the Quapaws. Where are the limits of the Wichita laim? When was it set up? How has it been maintained? What tribe or nation has ever recognized it?

But, further, the United States by treating with the Quapaw Indians recognized in such Indians a right to said lands similar to the rights in lands generally recognized in Indian tribes with whom the United States have made treaties (United States *vs.* Brooks, 10th How., 442, side p. 459).

So much for the present insistence of the counsel for the defendant Indians, that the Quapaws did not have the aboriginal title to the leased district, nor any part thereof. We now first inquire, When did the Wichitas assert their

claim? There was no such claim asserted in 1820, when the United States ceded this land to the Choctaws; nor in 1830, when the United States assured the Choctaws that a patent would issue to them for this land; nor in 1842, when the patent issued; nor in 1855, for in February, 1855, Superintendent Neighbors suggests negotiations with the Choctaws for the acquisition of land on which to colonize the Wichitas and other prairie Indians (Senate Ex. Doc. 13, 48th Cong., 1st session, p. 15). Acting on this suggestion, the United States, in June, 1855, leased the district from the Choctaws and Chickasaws for the purpose of colonizing thereon the Wichitas and other tribes of Indians. If the Wichitas were already there, occupying these lands by the aboriginal right of occupancy, why lease the lands for the purpose of settling them there? Clearly at that time there was no recognition of any such right existing in them (Treaty of 1855; Revision of Indian Treaties, p. 274, 11th Stat., 611). Treaty after treaty has been made by the United States conveying title to this land, and yet we are now told that these treaties are all void as against the Wichitas, because they had an aboriginal title of occupation which has never been extinguished. The United States acquired title again in 1855 and 1866, to so much of these lands as are known as the leased district. The Wichitas asserted no rights at either period. Moreover, it is to be borne in mind that they were present *and participated in the conference at Fort Smith* in September, 1865. *They then pronounced the treaty of August* 12, 1861, *alleged to have been made* with the Confederate States, to *be a forgery* (pp. 298–304, 318, 334, 335, Report of Commissioner Cooley and proceedings of conference at Fort Smith, submitted with report of Commissioner of Indian Affairs for 1865). It was mere assertion. No evidence was offered in support of it. We know that the Wichitas and affiliated bands were already located in the leased district as early as 1859 by virtue of the provisions of the treaty of 1855. They knew what was the object of the conference at Fort Smith. They could not

A.R. 109

have been ignorant of the seven propositions submitted at the conference, which were printed and freely circulated through the agents of the different tribes. *Their agent was present* (p. 313). *He participated, together with the Wichitas,* in the proceedings (p. 334, 335). They knew that one, probably the most important of all the seven propositions, was the requirement of the Government that the Indians owning lands in the Indian Territory should sell a part of their lands for the settlement thereon of Indians from Kansas and elsewhere. As inhabitants of the leased district, they were deeply and vitally interested in this question. If they had any aboriginal right in these lands, they now had full opportunity to assert this right. Whatever excuse they may offer for neglecting to assert this right theretofore, they cannot, if they failed to assert their rights then, offer any plea whatever—not even the plea of ignorance. Here upon this point the record is entirely silent. Their mouths are forever sealed.

But even if we consider their claim, on what kind of evidence does it rest?

The evidence of aboriginal right in the Wichitas is found in tradition recited in affidavits of old Indians, in interpretations which they offer of matter in ethnological dictionaries, in fragmentary accounts of ancient travelers through unexplored regions, in the assertions of the Wichitas of today concerning their ancestry, a people without writings, without records, without memorials of any kind or character. I cannot conceive of a court of law giving credence to tales of this kind as evidence. They are too much of the character of that class of literature respecting the early history of America of which Mr. Bancroft speaks when he describes them as tales "as wild as fancy could invent or credulity repeat." So far as they may be deemed worthy of investigation I must leave them to the criticism of my learned and accomplished associate, General Paine, who shows, as a result of scientific research and investigation, that the

Wichitas were always a small and wandering tribe, never exceeding over three hundred in number, roving over an immense territory, never having any fixed home or abode, and certainly never within an historical period having an habitat within what is now known as the leased district, from which could have arisen an aboriginal right of occupancy.

If there be any value in the evidence offered by the defendants to establish a right of occupancy in the Wichitas to the country now known as the leased district, it is absolutely dispelled by the testimony in rebuttal on this point and by the searching criticism of General Paine. But if no testimony had been offered in rebuttal, this evidence on the part of the defendants could not possibly have supported any claim of a right of occupancy. It is too intangible for a court of justice to take hold of it. It rests on none of the ordinary grounds of human belief.

To me this effort to ascertain the home of this wandering tribe a century or two ago would be a fruitless undertaking.

But this claim to original occupancy has been heretofore investigated by the Government in considering the question what land should be assigned in the leased district (Senate Ex. Doc. No. 13, 48th Cong., 1st session). Mr. Price, Commissioner of Indian Affairs, in a communication dated October 9, 1883 (p. 6), says Special Agent Townsend concludes that they (the Wichitas) have no more foundation in fact for the claims to original occupancy of the tract claimed by them than they have to certain tracts or districts in Kansas, New Mexico, or Texas through which they may have roamed and where they have sojourned temporarily. This conclusion appears to be correct. The nature of the occupany of the country by these Indians is not such as to impeach the title derived from the Quapaws, which has been recognized by subsequent treaties with the Choctaws and

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others (page 6. See also Special Agent Townsend's report, same document, pp. 43, 45, and 47).

Again the answer sets forth as evidence of this claim the treaty of August 24, 1835 (7 Statutes, 474), quoted on page 22 of answer. A.R. 16

The preamble recites the purpose of the treaty to be—

For the purpose of establishing and perpetuating peace and friendship between the United States of America and the Comanche and Wichita Nations and their associated bands or tribes of Indians, and between these nations or tribes and the Cherokee, Muscogee, Choctaw, Osage, Seneca, and Quapaw nations or tribes of Indians.

Article 1 provides:

There shall be perpetual peace and friendship between all the citizens of the United States and all the individuals composing the Comanche and Wichita Nations, and their associated bands or tribes, and the Cherokees, &c.

Article 2 provides:

Every injury or act of hostility by one or either of the contracting parties shall be mutually forgiven and forever forgot, &c.

Article 3 provides:

There shall be a free and friendly intercourse between all the contracting parties hereto, and it is distinctly understood and agreed by the Comanche and Wichita Nations, and their associated bands or tribes of Indians, that the citizens of the United States are freely permitted to pass and repass through their settlements or hunting grounds without molestation or injury on their way to any of the provinces of the Republic of Mexico, &c.

Article 4 provides:

It is understood and agreed by all the nations or tribes of Indians, parties to this treaty, that each and all of the said nations or tribes have free permission to hunt and trap

in the Great Prairie west of the Cross Timbers to the western limits of the United States.

Article 5 provides:

The Comanche and Wichita Nations, and their associated tribes or bands of Indians, severally agree and bind themselves to pay full value for any injury their people may do to the goods or other property of such traders as the President of the United States may place near to the settlements or hunting ground for the purpose of trading with them.

Article 6 provides:

The Comanche and Wichita nations, and their associated bands or tribes of Indians, agree that in the event of any of the red people belonging to the nations or tribes residing south of the Missouri river and west of the State of Missouri, not parties to this treaty, should visit their own towns or be found in their hunting grounds they will treat them with kindness and friendship, and do no injury to them in any way whatever.

We do not quote articles 7, 8, and 10, as counsel for defendant Indians do not deem them of sufficient importance to quote them. As they quote article 9, we do also.

Article 9 is as follows:

The Comanche and Wichita Nations and their associated bands or tribes of Indians agree that their entering into this treaty shall in no respect interrupt their friendly relations with the Republic of Mexico, where they all frequently hunt, and the Comanche Nation principally inhabit; and it is distinctly understood that the Government of the United States desire that perfect peace shall exist between the nations or tribes named in this article and the said Republic.

G.R. 16

Two years afterwards, on the 28th of May, 1837 (see 7th Statutes, p. 533) a treaty almost identical in language was made with the Kiowa, Kataka, and Tawakaro Indians. The Muscogees or Creeks and Osages were also parties to this treaty. Like the treaty of 1835, it was simply a treaty for

the establishment and preservation of peace between these tribes in the United States. Like the treaty of 1835, it provides, too, that—

> it is understood and agreed by all the nations or tribes of Indians, parties to this treaty, that each and all of the said nations or tribes have free permission to hunt and trap in the Great Prairie, west of the Cross Timbers to the western limits.

All of the parties, then, to the treaty of 1837, as well as the parties to the treaty of 1835, had the right to hunt and trap in this same Great Prairie.

Now the counsel for the defendant Indians seriously insist that both the United States Government and the Choctaw Nation of Indians, as parties to the treaty of 1835, admit by this treaty such an occupancy of this region of country in the Wichitas as concedes an aboriginal right in the Wichitas to the country described as the Great Prairie west of the Cross Timbers to the western limits of the United States.

This seems to us a very long-drawn conclusion. We are almost disposed to dismiss this contention by simply requesting the court to read the treaties of 1835 and 1837, and decide without any argument thereon. But we think we may say in all candor the counsel entirely mistake the character and scope of these treaties. The sole purpose of either treaty is the establishment and preservation of peace among the several tribes named with each other and the United States. There is no admission of such occupancy by any tribe from which could be inferred an aboriginal right of occupancy in any tribe in or to any territory.

There is certainly no such intention expressed in the treaty, nor is there any statement made from which such an intention could be implied. There is nothing in the treaty recognizing any title of any tribe in any territory, nor is there anything stated from which such a title could be implied. The treaty was not made for any such purpose.

There certainly is no right to the soil anywhere conceded or granted. As Judge Wilson remarks in his brief, page 75:

If the contention of the Wichitas is correct, it just as much establishes a right of occupancy in the Comanche, Osage, Seneca, Quapaw, Muscogee, and Cherokee Indians as in them. That all of these Indians had the exclusive right of occupancy of this land is simply preposterous, and the fact that they were all mentioned in the treaty confirms our theory that the Wichitas, in common with many other tribes or bands, may have roamed over and hunted in these lands, but negatives the idea that they had any such inherent rights therein, by reason of their alleged occupancy, as would entitle them to compensation upon the sale thereof by the United States.

The truth is, there is *no right* conceded in the treaty. There is a permission granted to each of the tribes to hunt and trap in the region described, and this permission is granted to one of these tribes as much as to another. It was a mere license to each of these tribes to hunt and trap on the land described, but as a license it was revocable at pleasure.

There is nothing in the treaty recognizing a title of any kind, in any tribe, to any territory. If there had been, the limits of such territory would have been defined and the character and extent of title set forth. It was apparent that all these tribes were in the habit of passing through this country and hunting in it. It is no more an estoppel in favor of the Wichitas as against the United States and the Choctaws than it is an estoppel in favor of the Choctaws or any other tribe named against the Wichitas.

It was a mere agreement for peace and a mere understanding that each tribe might hunt in the Great Prairie west of the Cross Timbers without molestation from any other.

But, in addition, we desire to supplement what we have said in reference to the character of this treaty by reference to a passage in instructions issued in 1837 by the Indian

Department to Col. A. P. Chouteau, special agent to the Comanches and others. The treaty of 1835 was executed on the 24th of August of that year (7th Stat., 474) on the part of the United States by Commissioners Stokes and Arbuckle. The treaty of 1837 was executed on the 26th of May of that year (7th Stat., 533) on the part of the United States by the same Commissioner Stokes and by Commissioner Chouteau, the special agent just named. The instructions to Chouteau, accompanying his appointment, bear date the 7th of April, 1837. The Indian Department and the Commissioners must have been very familiar with the treaty of 1835 and with the objects to be accomplished by the treaty of 1837. These instructions can be found in requests for findings of facts by counsel for defendant Indians, pp. X, XI, and XII, filed with their brief in the Court of Claims.

In the course of these instructions, on page XI, the department advises Colonel Chouteau:

It has been further stated that the Comanches are dissatisfied because the Creeks and Choctaws have extended their occupation and improvements to the country heretofore used by themselves as hunting grounds. This matter should be explained to them, so that they may *understand that the United States having purchased these lands from the tribes* possessing the occupant title, *has guaranteed the exclusive right* in it to the emigrant Indians. They cannot therefore be permitted to hunt upon it, after the latter are prepared to settle upon and cultivate it.

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It is impossible to doubt that the hunting grounds referred to are the hunting grounds referred to in the fourth article of the treaty of 1835 as the Great Prairie west of the Cross Timbers to the western limits of the United States. Counsel for defendant Indians quote authorities as to location of Cross Timbers (their brief, pages 5, 6, and 7). We cannot quote them all. We take the first. It is from the article in the American edition of the Encyclopedia Britannica,

title "Indian Territory." Speaking of this Territory, the article reads:

The eastern portion is fertile and well watered. The surface is mainly rolling prairie, with broad stretches of rich land along the streams and an abundance of timber. This section of the Territory is separated from the western part, which presents a different aspect by a broad belt of forest *known as the Cross Timbers*, which extends nearly across the Territory in *a north and south direction*, making the outcrop of the carboniferous formation. *Its breadth* ranges from forty to sixty miles. *West of this singular strip of forest the country assumes the appearance of the "Great Plains," that long incline which stretches eastward from the base of the Rocky mountains.*

General Paine (p. 76 of his brief) refers to longitude of Cross Timbers. He says they are located on Tanner's map (No. 56), on Kennedy's (No. 49), on Hunt and Randall's (No. 48), and on Austin's (No. 46), at 97° 15′ west longitude.

As then the Cross Timbers extended nearly across the Indian Territory north and south, and were nearly about 97° 15′ west longitude, we may safely conclude that the Grand Prairie west of the Cross Timbers, mentioned in the 4th article of the treaty of 1835, included all that part of the Indian Territory west of 97° 15′, and included all west of that longitude which had been ceded to the Cherokees, Creeks, and Choctaws. Now, Special Agent Chouteau was to explain to the Comanches that the United States had purchased this land from the tribes having the occupant title, and had guaranteed the exclusive right in it to the emigrant Indians (the Cherokees, Creeks, and Choctaws). They are also to be told that they cannot be permitted to hunt upon it after the latter are prepared to settle upon and cultivate it.

A. R. 8

The record discloses that the United States had purchased the occupant title of the Quapaws by the treaty of August 24, 1818 (7th Stat., 176), and had purchased the occupant title of the great and powerful tribe of the Osages by a treaty of June 2, 1825 (7th Stat., 240), covering an immense region

ch embraced nearly all of what was subsequently known the Indian Territory, certainly all of it except what been acquired from the Quapaws. That this was the rpretation which the United States placed on this treaty the Quapaw treaty is shown by the shortly after exed treaties with the Cherokees of May 6, 1828 (7th Stat.,), February 14, 1833 (7th Stat., 414), and the treaty of 29th cember, 1835 (7th Stat., 478), under which what was subquently known as the Cherokee outlet was extended to western limits of the United States, then under the anish treaty of February 22, 1821, fixed as between the kansas and Red rivers at 100 degrees west longitude. It s further shown by the Creek treaty of February 14, 1833 h Stat., 417), under which the United States assigned the untry south of that assigned to the Cherokees, therein deing the limits of the Creek country and fixing the western undary of the Creek country as the Mexican line, which s then 100 degrees west longitude.

And it is still further manifest by the Choctaw treaty of ptember 27, 1830 (7th Stat., 333), which assured the Chocws that a grant should be made to them of the country erein described, fixing the limits of this tract as the westrn limits of the United States, which, as we have just stated, t that time was the 100th degree of west longitude. Furhermore, each of these tribes was assured in their respective reaties that patents should issue to them for these respective racts of country, and which patents were afterward executed.

This discloses the interpretation placed on the Quapaw reaty of 1818 and the Osage treaty of 1825 by the United States. This interpretation was acquiesced in, not only by the Quapaws and the Osages who accepted reservations within the lands they had ceded to the United States, but of every other tribe or people who were in any way associated or connected with this region of country.

The United States had purchased the occupant title to this land and had granted the exclusive right to it to the

title "Indian Territory." Speaking of this Territory, the article reads:

> The eastern portion is fertile and well watered. The surface is mainly rolling prairie, with broad stretches of rich land along the streams and an abundance of timber. This section of the Territory is separated from the western part, which presents a different aspect by a broad belt of forest *known as the Cross Timbers*, which extends nearly across the Territory in *a north and south direction*, making the outcrop of the carboniferous formation. *Its breadth* ranges from forty to sixty miles. *West of this singular strip of forest the country assumes the appearance of the "Great Plains," that long incline which stretches eastward from the base of the Rocky mountains.*

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A.R. 8

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which embraced nearly all of what was subsequently known as the Indian Territory, certainly all of it except what had been acquired from the Quapaws. That this was the interpretation which the United States placed on this treaty and the Quapaw treaty is shown by the shortly after executed treaties with the Cherokees of May 6, 1828 (7th Stat., 311), February 14, 1833 (7th Stat., 414), and the treaty of 29th December, 1835 (7th Stat., 478), under which what was subsequently known as the Cherokee outlet was extended to the western limits of the United States, then under the Spanish treaty of February 22, 1821, fixed as between the Arkansas and Red rivers at 100 degrees west longitude. It was further shown by the Creek treaty of February 14, 1833 (7th Stat., 417), under which the United States assigned the country south of that assigned to the Cherokees, therein defining the limits of the Creek country and fixing the western boundary of the Creek country as the Mexican line, which was then 100 degrees west longitude.

And it is still further manifest by the Choctaw treaty of September 27, 1830 (7th Stat., 333), which assured the Choctaws that a grant should be made to them of the country therein described, fixing the limits of this tract as the western limits of the United States, which, as we have just stated, at that time was the 100th degree of west longitude. Furthermore, each of these tribes was assured in their respective treaties that patents should issue to them for these respective tracts of country, and which patents were afterward executed.

This discloses the interpretation placed on the Quapaw treaty of 1818 and the Osage treaty of 1825 by the United States. This interpretation was acquiesced in, not only by the Quapaws and the Osages who accepted reservations within the lands they had ceded to the United States, but of every other tribe or people who were in any way associated or connected with this region of country.

The United States had purchased the occupant title to this land and had granted the exclusive right to it to the

emigrant Indians. In 1835, in making a treaty for the establishment of peace between all these Indians—emigrant and indigenous—they had made an arrangement by which all were to be permitted to hunt in these grounds, but this permission was revocable at pleasure, and as the Creeks and Choctaws, who had the exclusive right in these lands, extended their settlements west, this permission was to be modified.

Now, this was the construction placed by the United States in 1837 on the treaty of 1835, not twenty months after its execution. It is utterly and absolutely inconsistent with any admission of anything in the treaty of 1835 from which could be implied a right of aboriginal occupancy in the Wichitas in these lands.

We now come to consider the claims of the Wichitas and the other bands under what they call the agreement at Fort Arbuckle.

Again, say the Wichitas and affiliated bands, we have another claim to the leased district based on an agreement had between our tribes and representatives of the United States held at Fort Arbuckle in 1859.

This agreement never assumed the form of a treaty, was never reduced to writing, was never submitted to the Senate, and never ratified by any department of the Government. Besides, the evidence is altogether conflicting as to the agreement itself. The evidence offered on the part of the Indians is altogether oral evidence, made years afterward, and based on recollections of what the United States officials said to the Indians at the council held at Fort Arbuckle. This is entirely too shadowy a claim on which to rest a title to land, and, besides, at that date the United States had only a title as lessee to this district. On the other hand, we have the official reports of the United States officials concerning the understanding at Fort Arbuckle.

February 1, 1855, prior to the treaty with the Choctaws and Chickasaws of June 22, 1855, Superintendent Neigh-

ested the propriety of negotiating with the Choc-
a tract of land lying on the east side of Red river
as Cache creek), near the Wichita mountains, for
nization of the Wichita Indians and such other
ndians as may be convenient to that location (*Sen-*
oc. No. 13, 48*th Cong.*, 1*st session*, *p.* 15). Now, this
country suggested and these were the Indians to
ized. The treaty of 1855 resulted a few months
d. Under this treaty the extent of country was
nlarged and the number of tribes to be provided
tly increased. On January 15, 1859, Agent Blain
50 Indians—Wichitas, Keechies, Caddoes, and a few
es—in his camp, 20 or 25 miles south of Fort Ar-
This camp was in the southwest corner of the Chick-
ntry, where, he says, he is located by the sufferance
hickasaws.

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escribes the leased district; says it is absurd that it
r intended for a small band like the Wichitas and
s; that it is capable of supporting 1,000,000 of in-
ts, and suggests the colonization of various other
(See pp. 16, 17, and 18.) Following this account of
Blain are the reports of Superintendent Rector, of
thern superintendency of Indians, and of Superin-
Neighbors, of the Texas Indians, as to what took
Fort Arbuckle in the council there with the Indians.
ere informed, say these reports, of the selection of
ade for them, with which they expressed themselves
ased, but not one word was said, according to these
about any assurance to them of the country known
eased district (pp. 21, 22, and 24).
rintendent Neighbors again reports to the Commis-
of Indian Affairs on July 18, 1859, enclosing sketches
elections of land made for the Wichitas and Keechies,
ares and Caddoes, and the several bands to be removed
Texas, and which sketch, he says (it being a very ac-
one), I wish should be taken as a part of my report

from Fort Arbuckle on the 2d instant (p. 25). Special Agent Townsend, in a report to the department July 26, 1883 (p. 42), reviews conference at Fort Arbuckle, says promises of the Government as to lands promised have been duly kept, and gives an account of the two tracts of land to be used by these Indians, amounting to 154,240 acres. The sketches of the lands selected are found on the map accompanying this document (No. 13, 48th Cong, 1st session), and also the map accompanying the report of Superintendent Oberly, of Indian Affairs (Senate Ex. Doc. 78, 51st Cong., 1st session).

There is certainly nothing in the oral evidence offered by the Indians of the proceedings at Fort Arbuckle, and still less in the official reports of those proceedings, to support any claim of title whatever to the leased district. When Superintendent Rector submitted his official report the department responded that his proceedings in the matter were approved and confirmed, and this was the only action taken in the premises to give it official force and recognition (Senate Doc. No. 13, 48th Cong., 1st session, p. 44).

The Wichitas and other bands occupied the lands assigned them by the Government officials who met them in council at Fort Arbuckle. The action of these officials, even approved by the department, could give them no title to the lands so assigned. They held the lands assigned by the mere permission of the Government, and even as to these lands were mere tenants at the will and pleasure of the Government. For some reason the Government did not see fit at that time to provide them with a permanent home, as it could have done under the treaty of 1855.

THE UNRATIFIED AGREEMENT OF 1872.

A.R. 38 This brings us next to the consideration of what is called the unratified agreement of 1872. The sketches of the lands assigned in consequence of the proceedings at Fort Arbuckle, as seen on the maps, show that the lands so assigned

were almost, if not altogether, within the tract described in the unratified agreement of 1872. The Indians were dissatisfied with the quantity of land assigned them by virtue of the council at Fort Arbuckle. In 1872 delegates, "chiefs and headmen and members of the Wichita and affiliated bands, duly authorized to act for their people," recites the agreement, were in Washington. Finally, Hon. Francis A. Walker, then Commissioner of Indian Affairs, without any legal authority whatever, entered into an agreement with them by which the tract of country described in the agreement was to be given them—the Wichitas and affiliated bands—for a home. He evidently expected the agreement to be rendered valid by subsequent ratification. It embraced 743,757.19 acres. The lands originally assigned under proceedings at Fort Arbuckle were 154,240 acres, and under this proposed agreement there was added 589,517.19 acres. The tract embraced in this unratified agreement is the tract the Wichitas and affiliated bands cede to the United States, all their right or claim in, by the agreement of June 4, 1891, and which was ratified by act of Congress of March 2, 1895. It is under this act this suit is brought, and these are the lands which constitute the subject-matter of controversy. This agreement had never been even recognized by Congress until the passage of this act of March 2, 1895. The answer states that it was signed by the Indians under protest. Special Agent Townsend, page 46, says in his report that the Indians repudiate and reject the unratified agreement of October 18, 1872, and claim that they were coerced into signing it. If this agreement then is invalid they acquired no title under it to the lands therein described, and they held no title whatever of which they were deprived by opening these lands to settlement under the act of March 2, 1895. The occupation which they held up to this time was a mere permissive occupation, and they were mere tenants at will of the Government. Simultaneously, then, with the ratification of the agreement

of June 4, 1891, under which they surrender all their cl
of every kind to the tract of country described in the
ratified agreement of 1872. Congress confers on the C
taws and Chickasaws the right to bring this suit to as
their claim to the same tract of land. The ratificatio
the agreement is subject to the rights as ascertained.

But besides the assignment of this home for the Wich
and affiliated bands set forth in the first article of this ag
ment, it contained, in the second article, a relinquishmen
the Wichitas and affiliated bands of their aboriginal ri
of occupancy. We would naturally expect in their re
quishment special mention to be made of what defenda
counsel assert to be the special tract of country to wh
these Wichitas, it is *now* insisted, had this aboriginal ri
The confines of this tract, the counsel on page 37 of
brief of defendant Indians, in the Court of Claims, say
established and admitted by the treaty of 1835 to
"The Great Prairie west of the Cross Timbers to the wes
limits of the United States." We have already consi
the Great Prairie—as the common hunting ground o
the parties to the treaties of 1835 and 1837. But the c
sel for defendant Indians felt that more was necessar
ascertaining the special limits of the tract which they c
as being subject to the aboriginal rights of occupancy o
Wichitas. There must be some limits fixed on the n
and the south; so they fix the southern boundary o
United States in that quarter, the aboriginal right o
Wichitas to these lands, west of the Cross Timbers, t
arbitrarily cut off on the south by the establishment o
boundary line between the United States and Spain b
treaty of 1821. "To the north the confines are indet
nate," say they (Defendant Indians' Brief, p. 37, in the
of Claims), "*but for the purposes of this cause they m*
placed at the Canadian." Now, we have already seen
the Cross Timbers, according to the authority quote
defendants' counsel on page 5 of their brief from the

clopedia Britannica, extended in a north and south direction nearly across the Territory. Marcy in his report quoted by counsel for defendant Indians on page 7 of their brief, in the Court of Claims, says the Cross Timbers extended from the Arkansas river (which at the longitude assigned to the Cross Timbers on the maps cited on page 76 of General Paine's brief, in the Court of Claims—97° 15′—is in the northern part of the Cherokee outlet) in a southwesterly direction to the Brazos, some four hundred miles. It is manifest, therefore, that the country referred to in the treaties of 1835 and 1837, under the designation of "the Great Prairie west of the Cross Timbers," as the country in which all the tribes parties to those treaties were to have free permission to hunt and trap, extended north far beyond the Canadian river—certainly through the Creek country—and probably a great way north through the Cherokee outlet.

But notwithstanding this, defendants' counsel say, *for the purposes of this case*, the confines to which the aboriginal right of occupancy of the Wichitas specially applies *may be fixed at the Canadian river*, the northern boundary of the Choctaw cession of 1820. This tract to which this aboriginal right of these 175 to 300 Wichitas especially applies is thus brought within the limits of the Choctaw country. Now, when the chiefs and head men of the Wichitas sign an agreement in 1872, surrendering all their aboriginal rights, we would expect special mention to be made of this accurately defined district of country to which their aboriginal right so particularly applied. More especially have we reason to expect this when we are informed, as we are by counsel for defendant Indians (on p. XII in their requests for findings), filed with their brief in the Court of Claims, in introducing this agreement, that the only action on the part of the United States looking to an extinguishment of the occupancy of the Wichitas, to which the Wichitas were a party, was this agreement.

But still more especially have we reason to expect particular mention of this accurately defined district, in surrendering their aboriginal right of occupancy, when we consider that this district included the very tract of country in which they had been colonized by the United States in 1859, in pursuance of the treaty of 1855 between the Choctaws and Chickasaws and the United States. It is not strange that the United States do not mention it, for the United States never recognized that these wandering Indians ever had any aboriginal right to any specific tract of country, but it is passing strange that under all these circumstances they, the Wichitas, omit all mention of it whatsoever. This tract of country, the truth is, had not even been conceived of in 1872 by the chiefs and head men of the Wichitas as their aboriginal home. The idea was ushered into existence long afterwards. With less accuracy these wandering Indians, but with more regard to the truth of their roaming everywhere, as set forth in General Paine's brief, surrender claims so vague and uncertain that they are not to be considered as rights of any kind whatever.

The second article of this agreement reads:

In consideration of the reservation provided for in the preceding article, the said Wichitas and other affiliated bands, hereby cede and relinquish to the United States all the right, title, interest or claim of any nature whatsoever in and to the lands in Texas, Louisiana, Indian Territory, or elsewhere within the limits of the United States. (See full copy of agreement, Defendant Indians' Requests for Findings, p. XIII.)

It was not sufficient to surrender the aboriginal rights which they and their affiliates had to lands in the Indian Territory, but also to any lands in Texas and Louisiana, and that not being sufficiently full, the words are added "elsewhere within the limits of the United States." As we have not heard of any special tracts to which the aboriginal rights of their affiliates peculiarly applied, we cannot but

conclude that this surrender was a special surrender by the Wichitas of all such claims in Texas, Louisiana, the Indian Territory, or elsewhere within the limits of the United States. What more could be wanted to establish beyond all question that this handful of savage Wichitas never had a local habitation within any definite and reasonable limits upon which could be predicated what is understood as a title based on an aboriginal right of occupancy? What more need be added to show that in their ignorance, nakedness, and savage independence they imagined themselves proprietors of the soil wherever they roamed in Texas, the Indian Territory, Louisiana, or anywhere else in the limits of the United States?

We have nothing further to add concerning the answers of the defendant Indians, except to state that the Wichitas have cost the Government $20,000 to $30,000 per year for twenty-five years, and it was therefore a good trade for it—the Government.

Whatever may have been the character of the title by which the Wichitas held the lands on which they were colonized, there are certain incontestable facts which remain. The Wichitas never paid a dollar for these lands, nor any other good and valuable consideration. They were merely assigned to them as a home by action of the Government. When the Government opens these lands for white settlement, they cease to be a home for Indians. The United States did not and could not convey to them a title through which it could open these lands to white settlement in violation of the terms on which its own title was acquired. Upon the termination of the occupancy of these lands by the Wichitas and affiliated bands, and the opening of the same to white settlement, the legal and equitable rights of the Choctaws and Chickasaws at once attached. The right is one easily ascertainable. It is a right to compensation for subjecting the lands to a purpose not only not contemplated in the grant of the lands, but a purpose in direct con-

flict with the covenants in the treaties of 1820 and 1
under which the Choctaws had been induced to remove
the Indian Territory, and for a purpose for which the lan
it is safe to say, never would have been granted. T
United States have recognized a right to compensation
the case of settlement with Creeks and Seminoles in 18
and with the Choctaws and Chickasaws in 1891, in referen
to the lands occupied by the Cheyennes and Arapaho
In these settlements they have recognized as a rule in e
mating this compensation the difference between the amou
paid for the lands for Indian settlement under treaties
1866 and the value of the lands for white settlement. Th
fixed the price at $1.25 per acre, and deducted the amou
previously paid for the lands for Indian purposes. W
think we have clearly established that in the cession of t
leased lands not a dollar was ever paid for their cessi
save what was paid for the Cheyenne and Arapahoe occ
pation in 1893. These very lands the Choctaws had pa
for by exchanging for them their ancient homes in th
State of Mississippi.

We find nothing in the final review of this case, either i
the answer of the Wichitas and affiliated bands or the ev
dence adduced thereunder, which can abate one jot of th
legal or equitable rights of the Choctaws and Chickasaws i
the premises. We will not now reiterate the grounds, legal
documentary, and historical, on which we have placed thes
rights. We submit them to the examination of the court
with the confident assurance that they will stand the test o
the closest scrutiny, and that the court will rise from th
investigation of this case satisfied that these rights are legal
just, and equitable, and that the Government cannot afford
in honor to disregard them.

GEORGE T. BARNES,
Attorney for Choctaws.

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